EXHIBIT D

ARBITRATION

AMERICAN ARBITRATION ASSOCIATION

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THE NEW YORK TIMES COMPANY,

A Petitioner,

v.

NEWSPAPER and MAIL DELIVERERS'-PUBLISHERS' PENSION FUND,

Claimant.

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ARBITRATION

New York, New York

Tuesday, February 10, 2015

REPORTED BY: BARBARA R. ZELTMAN

Professional Stenographic Reporter

Job Number: 90057

ARBITRATION

February 10, 2015
10:13 a.m.

Arbitration proceedings held at American Arbitration Association, 120 Broadway, New York, New York, before BARBARA R. ZELTMAN, a Professional Stenographic Reporter and Notary Public within and for the State of New York.

ARBITRATION

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ARBITRATION

ARBITRATOR IRVINGS: Good morning. Okay. We have -- parties have agreed on 145 Joint exhibits.

MR. ROTH: Some of the tabs are empty. It's for putting in some of the ones that are necessary.

MR. MILLER: If objected to exhibits that are admitted.

ARBITRATOR IRVINGS: Okay. Parties have so far agreed to --

MR. MILLER: I believe 115.

ARBITRATOR IRVINGS: -- 115 exhibits, and I presume you'll be provided with an index.

THE REPORTER: Thank you.

ARBITRATOR IRVINGS: Those will be simply referred to by exhibit numbers. And if other documents are admitted, they will be added at the end of the list.

Okay. So I have received and read the parties' prehearing briefs, so with that in mind, we've agreed that you can have up to 15 minutes for opening

ARBITRATION

statements. Do not feel compelled to use all the time.

MR. MILLER: Thank you.

OPENING STATEMENT BY MR. MILLER:

Thank you, Mr. Arbitrator. Evan Miller of Jones Day for The New York Times.

I will begin by addressing the overarching issue in this case, whether CBUs are wages or shifts.

Both parties have set forth in their briefs their respective readings of the operative contract language, but the fact is that the language in the abstract does not resolve the issue. So I'll address first how the parties have actually implemented the contract in practice over the three-plus decades that it's been in force.

You will hear testimony this morning from Morris Claffee, payroll manager of The New York Times.

And he will testify that The Times does not keep track of shift information

ARBITRATION

in connection with Pension Fund contributions and that it neither calculates nor reports shifts in connection with its Pension Fund contributions.

And that practice has been consistent as far back as anyone can recall.

Mr. Claffee will testify that the payroll process at The Times was and is to aggregate various categories of wages paid to NMDU union members multiplied by 8 percent and pay the resulting amount to the Pension Fund.

In light of this practice, The Times in fact routinely makes contributions to the Pension Fund relating not just to wages paid for actual shifts worked but also to payments to employees out on Workers' Comp. and for bereavement pay, holiday pay, vacation pay, none of which involves shifts being worked.

In all these events, The Times

ARBITRATION

aggregates wages paid and makes pension contributions on a percentage of that.

Mr. Claffee will also provide detailed testimony on how The Times makes contributions to the Welfare Fund.

And this is important, Mr. Arbitrator, because as you know the Fund's brief indicates that The Times' practices in connection with Welfare Fund contributions supports its position that CBUs equal shifts.

Mr. Claffee will testify that in connection with the Welfare Fund, The Times similarly makes contributions primarily based on a percentage of wages but also makes supplemental contributions based on shifts.

And more specifically the 1981 collective bargaining agreement, the same collective bargaining agreement that created the language at issue here, contains a provision for Welfare Fund contributions very similar to the pension provision.

ARBITRATION

And Mr. Claffee will testify that The Times treats this Welfare Fund contribution provision just like the Pension Fund provision. It aggregates eligible wages paid, multiplies by a contribution rate and contributes the resulting amount to the Welfare Fund.

But over time, The Times and the Union have also agreed to supplemental contributions to the Welfare Fund. In the late '80s, they agreed to a 47-cent per shift contribution in lieu of a COLA payment to members.

And in another memorandum of agreement, The Times and Union agreed that employees must make pretax contributions to the Welfare Fund based on a $3.67 amount per shift.

So when the bargaining parties wanted to make clear that contributions are to be made on a dollar per shift basis, they knew how to say it.

They said it in connection with the supplemental contributions to the Welfare

ARBITRATION

Fund. And Mr. Claffee will testify that for these shift-based contributions, The Times indeed reports shifts to the Welfare Fund in contrast to its reporting practice for pension.

And these practices we believe are important for at least two reasons: First, the Pension Fund has accepted The Times' contribution and reporting practice for years. Pension Fund and Welfare Fund apparently share the same personnel, and it appears that such personnel took it upon themselves to take the shift information that The Times provided under the Welfare Fund and transfer that data to the Pension Fund side of the ledger.

Second, this is important because it debunks one of the Fund's key arguments as to why CBUs equals shifts.

You will hear testimony that The Times and the Union also entered into a memorandum of agreement providing that the Union could on occasion direct a

ARBITRATION

portion of Pension Fund contributions to the Welfare Fund, and the Pension Fund argues that this diversion -- they called it reapportionment in the brief -- shows that CBUs equals shifts.

In fact, it demonstrates the opposite.

Indeed, the Union has over time directed that instead of the 8 percent contribution to the Pension Fund, only 6 percent or 6.5 percent would be contributed to pensions and the additional 2 percent or 1.5 percent of wages be paid to the Welfare Fund.

What The Times did on those occasions was add that additional nonshift-based percentage of wages amount to its nonshift-based Welfare Fund contribution.

And thus the diversion protocol between The Times and the Union was consistent with The Times making contributions to both funds on the basis of percentage of wages, not shifts.

ARBITRATION

The Fund also contends that the result of a 2010 payroll audit of the Times affiliate C & S supports its position.

But as you'll see during the course of the hearing, the manner in which the Fund's outside auditor characterized pension contributions is at best for the Fund inconsistent. And more importantly when the auditor explained in his final audit report how he had recalculated the contributions, he said that he multiplied qualifying earnings by the applicable percentage thus directly confirming The Times' own approach.

And as for the Pension Fund's own practices, the evidence will show that they can be reasonably and objectively described as inconsistent.

As I mentioned, the Pension Fund has historically consented to The Times practice of not reporting shifts or contributing on behalf of shifts.

And in certain correspondence with

ARBITRATION

The Times and other employers, the Fund has characterized the contribution obligation as a percent of wages.

Moreover, and quite importantly, the Fund's own actuary has certified each year for which we can find records that the contribution rate is consistent with our theory a percent of wages.

To be sure, Mr. Arbitrator, after The Times was assessed liability and after it initiated this arbitration, the actuary changed her verbiage.

But obviously a reasonable person would construe the phrase which was previously used "8 percent of wages" as stating a contribution formula based on just that, a percent of wages and not shifts.

The only practice of the Fund in which it has counted shifts as CBUs is prior withdrawal liability assessments. But most of those are roughly 20 years old. We do not know what all the relevant collective bargaining agreements

ARBITRATION

said, nor how those affected companies reported their contributions.

And The Times did not know of the construction of CBUs contained in those distant withdraw liability assessments, and indeed where the Pension Fund has been consistent, Mr. Arbitrator, is in conveying to The Times that CBUs were wages.

In that regard and thus in any event, the Fund should be estopped from applying CBUs as shifts retroactively.

You will hear testimony from Terry Hayes, Times senior VP for Labor Relations, that The Times has been sensitive to its withdrawal liability prospects in connection with this Fund and could have taken steps to prevent a partial withdraw had the Fund clearly made known its view CBUs equals shifts.

But the Pension Fund has, even if not intentionally, misled The Times about what constitutes CBUs.

First in 2009 and 2010, The Times

ARBITRATION

sought estimates of its withdrawal liability and specifically requested CBU information.

ERISA expressly requires that such request be responded to within six months of receipt but both the 2009 and the 2010 requests went unanswered in clear violation of ERISA.

When the Fund finally responded to a third request in mid 2012, the Fund based CBUs not on shifts but on wages earned.

And the Fund repeated this course of action in connection with a fourth New York Times request for an estimate.

On July 18, 2013, less than 60 days before it made the assessment in this case, the Fund sent The Times an estimate of withdrawal liability in which CBUs were again based on wages, not shifts.

So these estimates, when they were provided, are part of what we believe is a consistent pattern of conduct by the Fund indicating to The Times that CBUs

ARBITRATION

are wages.

The Times, as you will hear, was paying close attention to the issue of CBU levels, and had The Times known of the Fund's position it could have and would have undertaken bona fide business practices and conduct to address that contention.

Now let me turn to the next issue, second issue, application of the Segal blend.

By employing the Segal blend method, the plan used a discount rate to value Pension Fund liabilities that was lower than the actuaries best estimate of 7.5 percent for the plan's anticipated future investment returns.

And it's that 7.5 percent best estimate that the actuary used for funding purposes.

The Times' position on this issue was simple. Although ERISA might not expressly contain a provision requiring a plan to use the same investment return

ARBITRATION

assumption for valuing liabilities for withdrawal liability as it does for funding, the relevant structure of the statutory scheme does indeed legally require it.

And the Supreme Court in the Concrete Pipe case so held.

Moreover, later today you will hear testimony from The Times' actuarial expert Darren French who will testify that under accepted actuarial principles as well.

When an actuary certifies that the anticipated future experience of a pool of assets is 7.5 percent, actuarial principles do not allow that actuary to turn around and hypothesize a different, more conservative set of assets in order to derive a lower discount rate to value liabilities for the withdrawing employer.

And that was precisely one of the many issues that the Supreme Court addressed in Concrete Pipe.

The Court in that case was asked to

ARBITRATION

determine whether the withdrawal liability scheme, which allows the fund in the first instance to calculate unfunded vested benefits and then requires the employer to bear the burden of proof in overturning that calculation, satisfies procedural due process.

The Court said that the statute did satisfy due process, but Mr. Arbitrator, a linchpin in that finding was its judgment that actuaries have to use the same assumptions for funding as for withdrawal liability, especially the investment return assumption which, by the way, the Court characterized as, quote, the critical assumption, closed quote, in calculating unfunded vested benefits.

The Court recognized that in the absence of such a constraint actuaries and the multiemployer plans they serve might be pressured to act unfairly toward withdrawing employers. Requiring uniformity in use of the investment

ARBITRATION

return assumption said the Court, quote, limits the opportunity an actuary might otherwise have to act unfairly downward the withdrawing employer, closed quote.

In the current low interest rate environment, use of the Segal blend impacts The Times withdrawal calculation by more than 33 percent. And such a wide impact demonstrates precisely the act of unfairness to the withdrawing employer that the Supreme Court was concerned about.

Now, the Fund for its part intends to use as its expert Dr. Ethan Kra.

Dr. Kra, by the way, believes that the Segal blend method is an incorrect approach to calculating withdrawal liability in that it does not go far enough.

Dr. Kra argues that a so-called risk-free rate, akin to treasury bonds or high-grade corporates, should be used to value the withdrawing employer's share of unfunded vested benefits.

ARBITRATION

His theory is that because withdrawal liability is static, that is, you know, once determined it never changes --

ARBITRATOR IRVINGS: Two-minute warning.

MR. MILLER: Based on future -- because it's static, based on future investment performance or it never changes based on future fund performance, the withdrawing employer is not affected by actual later performance.

Kra contends as an economic principle that the value to the withdrawing employer of giving up any future upside performance above a risk-free rate equals the market value of the withdrawing employer being immunized from future downside performance risk, below a risk-free rate.

As an economic matter, there's some logic to Kra's approach, but that's simply not how Congress structured this

ARBITRATION

scheme and it's not how the Concrete Pipe court interpreted it.

In that regard and finally on Page 25 of the brief, the Fund contends that the reduction in overall contributions caused by The Times and the newspaper industry shrinkage generally makes valuing withdrawal liability at lower rates, at risk-free type rates proper.

It may well be the case that these are causes for concern for this Fund, but if so, the Fund should lower its investment return assumption from 7.5 percent and take less risk.

That will mean higher contributions from remaining contributors and potential tough slog with the Union to negotiate give-ups to allow those higher contributions.

Indeed, it's worth mentioning to you, Mr. Arbitrator, that The Times does remain a contributor to this Fund. After all, it's just a partial withdrawal. So

ARBITRATION

this recommendation therefore also affects The Times' interests.

But what the Fund cannot do is on the one hand estimate to the best of its actuary's ability that its assets will return 7.5 percent over time and on the other say that as to the withdrawing employer whose contributions will be invested just like any other contributor, for you we'll pretend that your liability contributions will be invested more conservatively in the context of the ERISA statute. That's unlawful and threatens due process.

Our third issue will, per our agreement, be taken up in briefing.

Thank you.

ARBITRATOR IRVINGS: Fine.

OPENING STATEMENT BY MR. RICHMAN:

I'm going to take to heart, Mr. Arbitrator, what you told the parties on the telephone, that you had read the briefs, that you expected only very short comments with respect to the issues so

ARBITRATION

that's what I'm going to stick to.

So what's really interesting about The New York Times' opening is that you didn't hear anything about the language in the collective bargaining agreement, and in fact you didn't hear anything about the language in the collective bargaining agreements. And the reason for that is pretty simple.

The starting point with respect to this analysis is the collective bargaining agreement. It's not the ending point as I'll address, but it is the starting point.

And when you read the language in the collective bargaining agreement, which I'm sure you've read already so I won't repeat it, it makes clear that the contributions are being made per shift for each shift worked.

In a collective bargaining agreement between the Union and City and Suburban Delivery Systems, it's C & S that's referred to in the papers, that

ARBITRATION

contains other language which really brings out the point.

And what it talks about is the wholesaler, which is C & S, shall contribute to the plan on behalf of such apprentice for each plan year thereafter a full shift contribution at the high scale rate, a full shift contribution. That is not the same language as The New York Times contract, but it does focus on shifts.

Now, The New York Times has been making this argument about past practice with respect to the Fund and talking about contribution rate.

And we've addressed this in our brief, so I'm not going to go into any detail about this. But the fact of the matter is that a contribution rate is different than a contribution base unit.

And one Court in the Second Circuit has recognized; that's the only Court that I know that has addressed that specific issue.

ARBITRATION

The contribution rate is 8 percent of some number. The contribution base unit is shifts.

Now, the language in The Times collective bargaining agreement also talks about contributions being made when an employee becomes eligible for Workers' Compensation benefits.

And you are going to hear testimony from the Fund's auditor, Mitchell Lewis, that the way that worked in practice is because it generally took some time for somebody to qualify for Workers' Compensation that no contributions would be made for that individual, and then when they got Workers' Comp., there would be contributions made for all the shifts missed.

And what is also the case, there is even a document from 2001 written by James Baker, the director of Labor Relations of The New York Times, confirming this practice of contributing to the Pension Fund specifically for

ARBITRATION

shifts on behalf of someone entitled to Workers' Compensation.

The fact of the matter is that The New York Times has in fact not been providing the Fund with information with respect to shifts.

It was easy for the Fund office, for the same office who does the Welfare and the Pension contributions, to be able to take the Welfare reports and use that shift information.

The fact of the matter is that, as you will see from the testimony that we're going to offer, that it didn't -- the amount contributed can be arrived at two different ways. And the same result occurs whether you talk about 8 percent of wages up to five shifts or whether you talk about 8 percent of shifts compensation, compensation of shifts -- in shifts up to five shifts.

Now, what the Fund has done in every single assessment is choose based on not only on the collective bargaining

ARBITRATION

agreement but its own determination, which it has a right to make, to view contributions being based on shifts. It has had that longstanding practice.

And in all of the audit reports that we will show you, which were shared in fact with the trustees including during the time that Mr. Hayes was a trustee as well as his predecessor from The Times, there is language in every audit report that indicates the contribution base unit is shifts.

Nobody from The Times ever raised a question about this issue.

We will also be offering testimony from John Urbank, who is a Segal consultant, and you will see a practice that every time that Segal was asked to do a withdrawal liability assessment or estimate, there was a request from Segal for contribution base unit, i.e., shift information.

In the earlier years, that information was provided over and over

ARBITRATION

and over again. And the estimates -- the two estimates for The New York Times, that wasn't provided.

And the Segal actuary, without that information, knowing that what she was doing was an estimate, did an estimate and put a note on the bottom of the page on the schedule that I will agree is cryptic. I don't really know what it means, but she is an actuary and -- but it was an estimate.

And the fact of the matter is that The Times complains about not getting information from the Fund, but they have trustees, a trustee on the Fund.

That trustee went to trustee meetings. That trustee had access to the lawyers. One of the lawyers to the Fund, one of whom was Neal Schelberg who comes from the Proskauer firm. The Proskauer firm also represented The New York Times, sometimes at the same time that Neal Schelberg represented the Fund with both parties representing each other in

ARBITRATION

connection with the Fund.

It was very simple for Mr. Hayes or anyone else from The Times to reach out to the appropriate parties and get an answer if they really wanted an answer, but apparently they did not.

I'm just going to take the rest of the time to talk about the presumption issue because that was addressed in The Times' brief and it was not addressed in ours.

What The Times does is cite a series of cases and says, uh-huh, the presumption doesn't apply to collective bargaining agreements.

And those cases involved a collection of contributions, contributions, delinquent contributions.

Those are not subject to the provision in ERISA 4221 that provides the standard for determining whether to uphold a withdrawal liability determination. And I won't go into depth about the standard, but the standard

ARBITRATION

simply is that the presumption is with the Fund, and The Times can only prevail to the extent it shows that the Fund's determination on the contribution base unit issue was unreasonable or clearly erroneous. That's what the statute says.

Lastly, I'm going to turn to this issue which first came up in one of our discovery calls, and actually The Times has furthered this in an affidavit that Mr. Hayes has submitted in connection with The Times' brief as well as The New York Times' own brief in this matter.

And that is The New York Times admits when they closed C & S, they focus on how much they needed to contribute to the Pension Fund to avoid a partial withdrawal.

What they're really complaining about here with respect to the information they say they couldn't get from the Fund is that they're really happy -- unhappy that they focus on total wages as opposed to shifts when they did

ARBITRATION

their calculations of whether a partial withdrawal would occur.

And so if you boil their complaint down to its essence is they are unhappy with the Pension Fund because the Pension Fund they say didn't provide them the correct information so they could avoid or evade withdrawal liability.

That, to me, is quite a novel concept.

The New York Times actually says in its prehearing brief that had The Times been aware of the Fund's position, it could have prevented shifts from falling below the 70 percent threshold.

I've never seen anyone make an -- avoid or evade admission of that nature ever. People don't usually say that's what they're doing.

But that is what The Times has said is, look, if you'd give me what I think was the correct information as opposed to so-called misleading me, I would have just manipulated my contributions to

ARBITRATION

avoid a partial withdrawal.

And we are ready to proceed.

ARBITRATOR IRVINGS: Okay. Thank you.

MR. MILLER: Mr. Arbitrator, can we bring in the first witness?

ARBITRATOR IRVINGS: Yes, please.

MR. MILLER: Mr. Arbitrator, I do want to raise the issue of sequestration.

We've assumed sequestration, but we do have a witness who is going to go on later on today, Mr. Terry Hayes, who is also a representative of The Times.

And, Ron, if you don't seriously object, we would like him to attend just as you apparently have a representative here.

MR. RICHMAN: We have a representative here but not a representative who is going to testify.

MR. MILLER: I understand.

MR. RICHMAN: And we do object

ARBITRATION

because I think there will be overlap with respect to Mr. Hayes and Mr. Claffee's testimony.

ARBITRATOR IRVINGS: Okay.

MR. MILLER: We certainly don't anticipate any overlapping in connection with two witnesses, but obviously it's Mr. Richman's cross.

ARBITRATOR IRVINGS: And you do have a representative of The Times here.

MR. MILLER: Yes.

ARBITRATOR IRVINGS: To avoid any potential problems, I would ask the same sequestration apply.

MR. MILLER: I assume that after Mr. Hayes is done testifying, he can then stay, proceeding on that assumption, yeah.

ARBITRATOR IRVINGS: Just to avoid problems on the assumption you're not going to call him back.

MR. MILLER: That's correct. And I think Ron and I have reached an

ARBITRATION

agreement that in connection with the respective cross-examinations, the cross-examiner can go beyond direct to avoid the necessity of calling back witnesses.

MR. RICHMAN: Just to make clear that we're talking about if you, for some reason you want to call him as a rebuttal witness, that's going to be a problem if he's here.

ARBITRATOR IRVINGS: Right. Okay.

MORRIS CLAFFEE, having been first duly sworn by Arbitrator Irvings, was examined and testified as follows:

DIRECT EXAMINATION BY MR. ROTH:

Q Good morning, Mr. Claffee.

Can you state your name for the record and also where you live.

A My name is Morris Claffee. I live in Norfolk, Virginia.

ARBITRATOR IRVINGS: Could you spell his last name.

ARBITRATION

THE WITNESS: C-L-A-F-F-E-E.

BY MR. ROTH:

Q Where are you employed, Mr. Claffee?

A I currently work at the New York Times Shared Service Center.

Q And what is the Shared Service Center?

A The Shared Service Center is a subsidiary of The New York Times Company and we handle their back-office work.

Q And what is your job title at The Times?

A I am currently the senior payroll in Accounts Payable and travel and entertainment expenses manager.

Q How long have you held that position at The Times?

A I've been the senior payroll manager for ten to 15 years.

Q In that capacity are there other employees who report to you?

A Yes. I have 15 employees who work for me.

ARBITRATION

Q And can you tell us in general terms what your duties are as senior payroll manager?

A Generally, I oversee the payment to all employees, their withholdings and make sure they get the appropriate amount into their net pays, and handle the payments to the vendors for the accounts payable side.

Q And more particularly with respect to the Pension Fund, meaning the Newspaper and Mail Deliverers'-Publishers' Pension Fund, and the Welfare Fund which I mean Publishers'-Newspaper Mail Deliverers' Welfare Fund, what are your duties with respect to those two funds?

A I currently review the process on at least on annual basis, and in addition I review the remittance reports that go out and the payments to the Fund.

Q I'd like to start by asking you how The Times goes about calculating the pension contributions to the Pension Fund.

Can you tell us how that calculation is performed?

ARBITRATION

A Yes, I can.

We currently aggregate a series of earning codes, which we call a special accumulator. And we use those earnings and multiply them by currently 8 percent to come up with the actual contribution to the Pension Fund.

Q And you referred to earning codes.

Can you tell us what you mean by "earning codes"?

A Sure. We have a series of earning codes. We have regular pay, we have sick pay, we have vacation, personal day, vacation pay that employees can receive in addition to. These are all what we call earning codes.

Q And there are actual codes for those?

A Yes, they each have their own individual codes.

Q So specifically for purposes of pension contributions, can you tell us which types of earnings are aggregated together and multiplied by 8 percent to come up with

ARBITRATION

the pension contribution.

A Can you repeat the question?

Q Specifically with respect to the Pension Fund contributions, can you tell us which types, which earning codes are added together before you then multiply it by the 8 percent?

A There's a pretty large listing but we use regular pay, vacation pay, military pay. There are a series of earnings based on jury duty, bereavement, et cetera. There are a whole series of earning codes. I don't know them off the top of my head.

Q That's fine.

What about the earnings that are associated with overtime shifts, by which I mean shifts that are worked beyond the ordinary five in a week.

Are those earnings aggregated for purposes of the Pension Fund?

A No, they are not.

Q And do those earnings have a separate code?

A Yes, they have their own code.

ARBITRATION
Q What is that code?
A We use earning code CRS currently.
Q And how does the payroll system know that an employee is working let's say a sixth shift in a week as opposed to a third or fourth shift that week?
A Well, we have a couple different ways that determines that. But the first step is the time and attendance system, which is controlled at the plant by the foreman, which controls their work for the week.
And after the five shifts it converts the next shift to a sixth shift which has a separate earning code.
Q And how does the -- what is the relationship between the payroll system and that time and attendance system?
A The information from the time and attendance system is imported on the payroll system on a weekly basis, and we use that information to actually process the payroll.
Q Now, with respect to the types of earnings that are added together for pension

ARBITRATION
contribution purposes, do they all necessarily arise from shifts that are actually worked by an employee?
A Not necessarily. We have vacation pay, bereavement. Certain payments are not actually worked but are included in their pay.
Q And how does the system treat for pension purposes the pay that goes to workers who are out on Workers' Compensation?
A We include that in the pension contribution, those wages are included.
Q And how does The Times determine how much to pay the workers who are out on Workers' Compensation if they are not actually working any shifts? What are they paid?
A We actually have a process. We go back and determine the last full eight weeks and take the eight-week average for their occupational pay.
Q Now, when an employee does work a shift, regular shift, how are the earnings

ARBITRATION
from that coded in the system? What is the earnings code for that?
A It would be RGM is the earning code we use for a work shift.
Q And that's the only earnings code for regular work?
A No. We have another code that we use for foreman which is regular pay as well but it's a different code. We use REG.
Q So REG is for the foreman?
A Yes, sir.
Q And how are the foremen generally paid for their work?
A Foreman are salaried. They get paid based on an annual salary.
Q Is their pay based on the number of shifts they work?
A No. It's not based on shifts at all, no.
Q How does The Times make pension contributions with respect to those salaried foremen?
A We take the appropriate wages and multiply it by 8 percent. And that's how we

ARBITRATION
calculate the contributions.
Q Now, are there any types of work that entitle an employee to any additional pay beyond the regular pay?
MR. GARFIELD: Objection. I think he's leading the witness.
ARBITRATOR IRVINGS: I'm sorry. What was the question?
(Requested portion of record read:
"Q. Now, are there any types of work that entitle an employee to any additional pay beyond the regular pay?")
(End of read-back.)
ARBITRATOR IRVINGS: You can answer the question. Go ahead.
MR. MILLER: Would you mind repeating it again.
(Requested portion of record read:
"Q. Now, are there any types of work that entitle an employee to any additional pay beyond the regular pay?")
(End of read-back.)
A Yes, there are, yes.
Q Can you tell us about those?

ARBITRATION

A Yes. Sure. We have some special equipment at the plant that if an employee works on a special equipment, they would get additional pay for driving a tractor-trailer, for example, or working on a forklift the back of the truck, that generates additional pay for whatever they're doing.

Q And how is that type of pay treated for pension contribution purposes?

A Those earnings are included in our special accumulator and it is included in the calculation for the pension contribution.

Q Now, when calculating pension contributions, do you or does the payroll system ever actually count up the number of shifts that an employee has worked?

A No, we do not. Never. No.

Q And, in general, has this approach that you've been testifying about, has it been consistent throughout your tenure at The Times?

MR. GARFIELD: Objection. I

ARBITRATION

think he's leading again.

ARBITRATOR IRVINGS: Sustained.

BY MR. ROTH:

Q Can you tell us about the practices, the historical -- anything about the historical practices of The Times with respect to calculating pension contributions?

A Sure. We transitioned in mid-2008 and at that point of transition we went back and reviewed how it was handled previously, and we made sure we mirrored what was done in the payroll systems system that goes back quite a few years.

Q Thank you.

How often does The Times remit pension contributions to the Pension Fund?

A We remit the contributions on a monthly basis.

Q And what does The Times send to the Pension Fund when it remits a contribution?

A Well, we send them the money for the contributions and we send them a report that actually gives them the details of the

ARBITRATION

contributions, the amount of the payment, the remittence.

Q So I would like you to turn to Joint Exhibit 53 in the binders.

ARBITRATOR IRVINGS: Just "exhibit." It's going to be hard habit to break, but it's my effort to reform. It's Exhibit 53.

MR. MILLER: Exhibit 53.

BY MR. ROTH:

Q Do you recognize this document?

A Yes, sir. Sure do.

Q What is it?

A This is what we call a remittance report that is sent to the Fund office.

Q Can you tell us what the date of this report was?

A Sure. It was June 2010.

Q Can you just describe for us what the first three columns in this report represent?

A Absolutely. The first column is the individual's name we're contributing to.

The blacked-out column, we blacked

ARBITRATION

out the Social Security number for obvious reasons for confidentiality.

The employee ID number is a unique ID number applied to each employee at The New York Times.

Q What does the fourth column mean?

A The fourth column is what we call a deduction code for the Deliverers' Pension.

The fourth column is the Deliverers' Pension, DELPEN, represents the Deliverers' Pension, our code for that contribution in the payroll system.

Q And then the next two columns are headed DEDMTD and DEDYTD.

Can you tell us what those columns represent?

A Absolutely.

The first one, the DEDMTD, stands for deduction month-to-date. And that's the actual calculation of the pension for that employee that we contributed to the Pension Fund for that month.

Q And the YTD column?

A That would be similar but that's

ARBITRATION

the year-to-date amount at this point in time that we would have contributed to the Pension Fund for that employee.

Q Those two columns, what units are those in?

A These are both in dollars and cents.

Q Then the next two columns on the report are titled Base MTD and Base YTD.

Can you tell us what those columns represent?

A Absolutely.

The Base MTD is base month-to-date. That's an earning column. Those are special accumulated earnings for the pension contribution that we multiply by the percentage.

The Base YTD is the base year-to-date column through June 2010 that would have been multiplied by 8 percent to come up with the monthly contributions.

Q And then for those two columns, what units are those numbers in?

A These two columns are both in

ARBITRATION

dollars and cents.

Q And then you have a bunch of different rows in the column. What do the rows represent?

A Each row is individual employee.

Q And if you can flip to the last page of this exhibit, there is a line at the end, a row at the end that says DELPEN Total.

Can you tell us what that row is indicating?

A The DELPEN Total row at the end is the sum of all the employee's contributions for that month under the DEDMTD. That's the total of all the employees.

Q And what about under the base columns?

A It's similar. The total of all the individual employee's amounts for the month. Or the year-to-date.

Q And what units are those totals in?

A The totals are in dollars and cents.

Q Does anything on this remittance

ARBITRATION

report indicate the number of shifts any employee worked?

MR. GARFIELD: Objection. Leading.

ARBITRATOR IRVINGS: Go ahead, you can have that question. You are right; however, the answer is no.

Let's move on.

BY MR. ROTH:

Q And we can put aside the exhibit.

Do you ever report to the Pension Fund how many shifts were worked by a particular employee?

A Never, no.

MR. GARFIELD: Objection. Leading.

ARBITRATOR IRVINGS: Again, why don't you rephrase it so it's not leading.

What's your practice regarding reporting shifts.

BY MR. ROTH:

Q Mr. Claffee, what is your practice regarding reporting shifts worked for the

ARBITRATION

Pension Fund?

A We don't have a practice. We don't report shifts for the Pension Fund.

Q Can you tell us historically anything about the format of these reports? Like going back, what do those reports look like ten years ago? Do you have any knowledge about that?

A Yes, I do. At the time of transition from the old system to the new system, we actually mirrored the reports that were previously filed under the old system as far as we can go back. So this is the same format that's been used for years.

Q And to whom did you send these remittance reports?

A These remittance reports are e-mailed to the Fund office.

Q And how did you generally communicate with the Fund office?

A Via e-mail.

Q To your recollection, did anyone from the Pension Fund ever ask you to include shift numbers in your remittance

ARBITRATION

reports?

A Never, no. Absolutely not.

Q And if anyone from the Pension Fund had asked anyone at The Times to include shift numbers in the remittance reports, would that request have come to you?

MR. GARFIELD: Objection. I'm not sure the witness has any foundation to answer that.

ARBITRATOR IRVINGS: Sustained.

BY MR. ROTH:

Q Do you know whether if someone from the Pension Fund had asked someone from The Times to report shift information, do you know whether you would have heard about that request?

MR. GARFIELD: Same objection.

ARBITRATOR IRVINGS: Do you want to talk about general communications between the Fund and The Times.

BY MR. ROTH:

Q To the extent there were general communications between the Pension Fund and

ARBITRATION

The Times, would you have been aware of those communications?

MR. GARFIELD: Same objection.

MR. ROTH: Just move on.

ARBITRATOR IRVINGS: Move on.

MR. ROTH: Thanks.

BY MR. ROTH:

Q Now I'd like to ask you some questions about the Welfare Fund, Deliverers' Welfare Fund.

Does The Times make contributions to the Welfare Fund?

A Yes, we do, yes.

Q Can you tell us how those contributions are calculated?

A Well, there are more than one Welfare Fund, so there's really not one way we do the calculations to the Welfare Fund.

Q Can you explain what you mean by that?

A Sure.

We have -- one of the employer Welfare Funds is a special accumulator similar to DELPEN. It's a Deliverers'

ARBITRATION

Welfare employer pay contribution.

Then we have a shift-based contribution for DELCOL. Those are codes we use in the payroll system. DELCOL, that's a shift-base.

And we also have two employee contributions that are made that are deducted from an employee's pay and remitted to the Fund.

So it's kind of not really one type.

Q Okay.

So I think you testified that there is a contribution that is referred to as DELWEL?

A Yes, sir.

Q How is that calculation -- how is that contribution calculated by The Times?

A We aggregate a series of earning codes, total them up by employee and multiply that amount by the current rate which I believe is 7.68 percent. And that's basically how we do the calculation for that based on the aggregate earnings.

ARBITRATION

Q How do the earnings that are aggregated for this Welfare Fund contribution compare to the earnings that are aggregated for the Pension Fund contribution that we had talked about earlier?

A The DELWEL and the DELPEN are the same earning codes they use for the calculation.

Q Okay.

And then I think you mentioned something called the DELCOL Welfare Fund contribution as well?

A Yes, sir.

Q Can you tell us what that is?

A Yes, sir. The DELCOL is a shift-based contribution which is capped at five shifts per week except for personal days which are unlimited for the week that they would get credit for a shift.

Q And how does the payroll system compute that contribution, the DELCOL contribution to the Welfare Fund?

A The calculation is we take the

ARBITRATION
number of shifts up to five for the week and we multiply that by 47 cents per shift. And whatever that number comes up to, that's the amount that we remit to the Fund office.
Q And how frequently does The Times remit those contributions to the Welfare Fund?
A Those contributions are remitted weekly.
Q And when The Times remits those --
ARBITRATOR IRVINGS: Just so I'm clear, you are saying that the DELCOL is remitted weekly or all Welfare Fund is remitted weekly?
THE WITNESS: All the Welfare Fund are remitted weekly. All.
BY MR. ROTH:
Q Okay. And when you make those weekly remittances, what does The Times send to the Welfare Fund?
A Again, we send the money and we also send what we call remittance reports to the Fund office.
Q And how do those remittance reports

ARBITRATION
to the Welfare Fund compare to the remittance reports that The Times sends to the Pension Fund?
A Could you repeat that question?
Q Sure.
How do the remittance reports that you send to the Welfare Fund compare to the reports that you send to the Pension Fund?
A Well, the DELWEL and the DELPEN remittance reports are very similar. But the other three are all shift-based, so, you know, three are shift-based and one is percentage-based.
Q I'll ask you to turn to Exhibit 32 in the binder. I believe that should be in the first binder.
Mr. Claffee, do you recognize this document?
A Yes, I do.
Q What is it?
A Give me one second to look through it.
This is the remittance report we send to the Fund for the Welfare Fund

ARBITRATION
contributions.
Q Starting on the first page of the actual report as opposed to the cover e-mail, what type of contribution is being reported on this page?
A This is the DELCOL which is the Deliverers' COLA Welfare Fund.
Q Just remind us what type of contribution that is.
A This is shift-based contribution.
Q Can you walk us through each of these columns in this report, explain what they are?
A Absolutely.
Similar to the first report, you have the individual's names listed individually for their weekly contribution. You have their unique employee ID number in the second column. They're actually the last four digits of their Social Security number for confidentiality reasons.
And the DEDCD column, that is what we call the Deliverers' COLA contribution.
The next column, the DEDCUR, is the

ARBITRATION
deduction current column which is actual calculated amount of the shifts, actual amount of the contribution based on the shifts, $2.35 for the first person.
The next column, DEDYTD, stands for the year-to-date amount that we've contributed based on the shifts for DELCOL.
The next column, which is the Base CUR, is base current. That Number 5 is a shift count. So that's five shifts for the current period.
The next column is Base YTD, is the base year-to-date. That would be this employee's total shifts at this point in time whenever this report was created.
Q Just to clarify, what are the units of those last two columns, the base columns?
A The last two columns are based on shifts.
Q And what happens, so if you were to take the base current for a particular employee, multiply that by 47 cents, what would you get?
A You would get $2.35.

ARBITRATION
Q You are talking about the first?
A Yes. Five times 47 would be 2.35. Correct. Whatever the number of shifts are would be times 47 cents.
Q Let me ask you this.
How do the categories of work and categories of absences that count for purposes of this DELCOL contribution to the Welfare Fund, how do they compare to the categories of work and categories of absences that count for the DELPEN Pension Fund contributions?
A Just so I'm clear, comparing DELCOL to the DELPEN?
Q Correct.
A Well, the DELPEN is an aggregate of quite a few earning codes including items that are not shift-based like special equipment, like tractor-trailer differentials, forklift payments.
Those are not included in the shift calculation. I hope I'm answering your question.
Q That's fine.

ARBITRATION
Are there any other differences that you --
A Yeah, I mean we have a few other ones. We have if an employee goes on active duty, we have military pay to supplement their pay.
Q How is that military pay treated for pension contribution purposes?
A We would include that in the DELPEN aggregate and they would get a contribution.
Q And how was that military pay treated for DELCOL purposes?
A It's not part of the DELCOL process. It's not included in that calculation at all.
Q And then if you just flip ahead in the same exhibit to I think it's the seventh page.
Can you tell us what this portion of the report relates to?
A Yes, sir.
Q This particular section is going to reflect the Deliverers' Welfare, the DELWEL contribution.

ARBITRATION
What's that contribution again?
A It's the Deliverers' Welfare contribution.
Q How does this portion of the report compare to the portion of the report that we were just looking at for DELCOL?
A This portion is actually an aggregate and based on a percentage. An aggregate of earnings based on a percentage.
Q So what, if any, differences are there between how it's actually presented on the report?
A Well, this is presented in dollars and cents versus shifts as to DELCOL.
Q Great.
So I'm going to ask you next to turn to Exhibit 30.
Do you recognize this exhibit?
And we're really going to focus on the first page.
A Okay.
Q Can you tell us what this is?
A This is what we call a rate sheet.
Q And what is a rate sheet?

ARBITRATION
A This is a sheet we update periodically and at least on an annual basis with any contractual changes.
Q And what's the date on this document?
A This one is dated 3-23-2011.
Q And can you just take a look at the first line that says "Welfare DED Code 613." And can you explain for us what that means and what the various items on that line mean?
A Sure.
The Welfare DED Code 613 represents the previous code used in the previous payroll system, the old code. We transitioned to My Shop and the corresponding code in My Shop now is that DELCOL code.
So 613 is a DELCOL now in the new system.
And if you go across, the 10-1-89, 1989, represents the effective -- as far back as we can go is 10-1-1989, we've been using the .47 per shift straight time.

ARBITRATION

Q And then can you take us through the next line on this sheet?

A Absolutely.

The Welfare DED Code 614 was again the old legacy code which now translates to the DELWPB, and it's an employee contribution. The date there was 3-31-1987.

And the per shift amount was $3.67 per shift with a five-shift cap.

Q Okay. And then the next one down?

A Sure.

Again, this is a Welfare DED Code 615, the old legacy code converted to DELWEL in our new system.

And then the years show the different rates as they changed during particular time periods, the percentages.

Q And then the next line down?

A Is casual Welfare deduction Code 616 converted to DELWXT in our system, and this one is per shift with the shift amount changes per year. On that line.

Q And what does it mean "casual"?

A A nonregular employee who gets

ARBITRATION

called.

Q And then can you take us through the next line below that, Delivery Welfare EE pretax?

A This was deduction Code 618 in our old system which converted to DELWSP in the new one, which is a Welfare contribution and at this time it was six dollars per shift with a five-shift max per week.

Q And then finally can you explain the bottom section?

A Absolutely. That's our Pension Code 620 which now converts to the DELPEN code, and then we have the rates from 6-1-94 through 3-31-09 as it changed on this sheet.

Q And do you know why nothing in this section, this Pension deduction of 620, why nothing in this section talks about shifts? Do you know why that is?

A It has nothing to do with shifts. It's strictly based on an aggregate of earnings.

Q Thank you.

So next I would like you to turn to

ARBITRATION

Exhibit 42.

If you can look at -- not the cover e-mail but just the first page after the cover e-mail, first page of the attachment.

Are you familiar with this document? Again, not the e-mail but the attachment.

A Yes, I'm familiar with this document.

Q And what is it?

A This is a letter we get from the Fund office each year that provides us with the rates for the Welfare and the Pension plan.

Q And the numbers that are listed under Pension Fund High Rate and Pension Fund Low Rate, do you see those sections of this sheet?

A Yes, sir.

Q What do you use those for?

A I don't use them for anything currently.

Q Now, if you were going to use these numbers to calculate Pension contributions,

ARBITRATION

how would you calculate the contribution for an employee who was, let's say, out on Workers' Compensation using these numbers?

A It wouldn't get included.

If you just use these numbers --

ARBITRATOR IRVINGS: I don't understand the question.

THE WITNESS: I was going to ask for a little help on that. I'm sorry.

BY MR. ROTH:

Q So I'm asking if -- you see there are different numbers listed here under Pension Fund High Rate, Pension Fund Low Rate, et cetera.

Is there a number representing the contribution to a worker who is out on Workers' Compensation?

A No there's not.

Q And is there a number on here that would represent the proper contribution to an employee who had worked a shift using specialized machinery?

A No, there's not.

ARBITRATION
Q And what about for the foreman, salaried foreman? Any number on here for that?
A No, there's not.
Q Thanks.
Mr. Claffee, do you recall whether a New York Times subsidiary known as C & S had a 401k plan for its employees?
A Yes. I do recall them having a 401k plan, yes.
Q Do you know on what basis contributions to that 401k plan were made?
A Yes. They were made -- they were shift-based contributions.
Q And can you turn to Exhibit 84.
Can you turn to Page 3 of this contract. Take a look at the chart that's at the top of this page under the heading 401k Plan Contribution.
And what does this chart indicate to you about the basis on which C & S made contributions to its 401k plan?
A Looking at this, based on, for example, on 3-31-06, they were getting $7.27

ARBITRATION
per shift they worked.
Q Do you know who administered the 401k for C & S?
A Yes.
Q Who was it?
A T. Rowe Price.
Q And when C & S made contributions to that 401k, do you know if it reported anything to the plan administrator about how the Fund contributions were calculated?
A Yes. We reported by individual the shifts and the contribution.
Q And how do you know that?
A I was the one who was responsible for doing the remittance.
MR. ROTH: Thank you.
No more questions.
MR. MILLER: Take a few minutes.
ARBITRATOR IRVINGS: Certainly.
(A brief recess was taken.)
CROSS EXAMINATION BY MR. GARFIELD:
Q Good morning, Mr. Claffee.

ARBITRATION
A Good morning.
Q So you are responsible for ensuring that The Times remits the amounts it owes to the Pension Fund, correct?
A That's correct.
Q So you need to know how The Times contributes to the Pension Fund?
A Can you -- I'm not sure what you mean by that.
Q Well, in order to remit the appropriate amounts, you would need to know how The Times is supposed to contribute to the Pension Fund, correct?
A I understand the calculation, yes.
Q And you are similarly responsible for ensuring that The Times remits the correct amounts to the Welfare Fund?
A That's correct.
Q And for the Welfare Fund also you need to know how The Times contributes to the Welfare Fund?
A Yes, sir.
Q Can you please take a look at Exhibit 8.

ARBITRATION
I will tell you, my question about this is going to be very general. But if you want to take a moment to familiarize yourself with the document, please go ahead.
A Yes, sir.
Q Mr. Claffee, prior to your deposition in this matter, you had not recalled ever seeing this document previously; is that correct?
A That's correct.
Q And it's not your job to read and interpret the contracts that govern The Times' contribution to the Pension Fund?
A That's correct.
Q So you're directed as to how The Times should contribute to the Pension Fund by The Times Labor Department?
A Yes, sir.
Q So you speak with people in The Times Labor Department to understand how much should be remitted to the Pension Fund, right?
A I review the calculations with the Labor Department.

ARBITRATION
Q Do you speak with Andrew Gutterman?
A Occasionally.
Q And Chris Biegner?
A Yes.
Q And is there anyone else in The Times Labor Department who you review the calculations with?
A No one else.
Q So you are told how The Times should contribute to the Pension Fund?
A What I create is I update the rate sheets on an automatic basis.
Before we implement any changes, we review them with the Labor Department in New York.
Q Does the Labor Department have sign-off on the method through which you contribute to the Pension Fund?
A They approve the calculation process.
Q Do you ever speak with people at the Pension Fund office to understand how much The Times is required to contribute to the Pension Fund?

ARBITRATION
A No, I do not.
Q Never speak with -- you've never spoken with Barbara Albergo about how The Times should contribute to the Pension Fund?
A No, I have not.
Q Do you ever speak with anyone at the Newspaper and Mail Deliverers Union of New York and vicinity to understand how The Times is required to contribute to the Pension Fund?
A No, I do not.
Q Do you ever speak with other contributing employers to the Pension Fund to understand how The Times was required to contribute to the Pension Fund?
A No. I'm not familiar with that at all, no.
Q Other than Mr. Gutterman and Mr. Biegner, is there anyone else that you speak with about how The Times should contribute to the Pension Fund?
A That's it.
Q And it's correct, Mr. Claffee, that

ARBITRATION
you receive documents from the Pension Fund about how The Times was obligated to contribute to the Pension Fund?
A Not from what -- what document are you referring to?
Q Take a look at Exhibit 42.
I believe that Mr. Roth asked you about the second page when you were testifying earlier.
If you could take a look at that, please.
A Okay.
Q Do you receive a document that looks like this approximately once a year from the Pension Fund?
A Yes, we do.
ARBITRATOR IRVINGS: Just so I'm clear, you answered "we." And I'm not sure you are using the royal "we" or it's just you who gets it.
THE WITNESS: It could come via e-mail to my staff, so not necessarily myself would receive it. I would receive it but not

ARBITRATION
necessarily I would get it directly.
BY MR. GARFIELD:
Q You would personally see it each year; is that correct?
A I would see it each year, yes.
Q Mr. Claffee, please take a look at the left-hand side of the top chart under the words "effective 3-31-2013."
Do you see there are four terms written there: Day rate, short night, long night and SAT, period, night.
Those are different types of shifts, correct?
A Correct.
Q And then look at the numbers immediately to the right of those four terms.
You agree those are the different rates that employees earn for working their respective shifts; is that correct?
A Yes.
Q Now, when you received this document approximately once a year, did you see the information on the right-hand side

ARBITRATION

of the column under Pension Fund High Rate that calculates the wages that an employee earns per shift times 8 percent?

A You asked do I see it?

Q Did you see it when you received it?

A Yes, yes.

Q Mr. Claffee, what's your understanding of the term "shift" as we're using it here today?

A The term "shift," my understanding is when someone works a shift.

Q Does it refer to a number of hours?

A It could, I guess. I'm not too familiar with that. I'm not sure what you are asking there.

Q When you received this form approximately once a year, did you ever communicate with anyone in the Pension Fund office that you thought the form was incorrect?

A I don't use that column for anything so I never communicated anything out.

ARBITRATION

Q So the answer to my question is no?

A No. Yes, sir.

Q The Times does not actually contribute to the Pension Fund 8 percent of all wages that an employee earns in a month; is that correct? For shifts worked?

A That's correct.

Q If an employee works six shifts in a week, The Times does not contribute 8 percent of the money the employee earned in respect of all six shifts; is that correct?

A That's correct, yes, sir.

Q And why is that?

A I couldn't tell you that. I could tell you the mechanism. I don't understand why we don't contribute on the sixth shift.

Q Mr. Claffee, during your deposition in December, if you recall, you initially testified that The Times' percentage-based contributions to the Pension Fund and the Welfare Fund were based strictly on a percentage of total wages without any limitation due to shifts, correct?

ARBITRATION

A Correct.

Q And later during the same deposition following a break and discussion with counsel, you changed your testimony, correct?

A Correct.

Q You recently signed an affidavit that was submitted with The Times' prehearing brief in this matter; is that correct?

A Yes, sir.

Q In your affidavit, you described the sixth shift as overtime; is that correct?

A That's correct.

Q Do you have any understanding of whether the term "shift" is defined in the collective bargaining agreement between The Times and the Union?

A I don't know that.

Q Is it your understanding that any shift beyond five in a week is an overtime shift?

A Correct.

ARBITRATION

Q If an employee works five shifts in a week -- I want to give you an example to run through the calculation.

A Okay.

Q To keep the numbers simple, let's say the wage rate is $200 per shift.

So is it your testimony that to determine how much The Times is required to contribute to the Pension Fund for that employee in this example, you would take 8 percent of a thousand dollars?

A You said five days -- shifts at $200 for a thousand dollars times 8 percent would be $80, yes, exactly.

Q Would you describe that calculation as taking 8 percent of the total wages?

A If that was all there were, that would be 8 percent of the total, yes.

Q Now, if The Times contributed by shift instead for the same employee at $200 per shift, to figure out how much The Times was required to contribute for each shift you would take 8 percent of $200, correct?

A To determine the amount per shift?

ARBITRATION
Q Correct.
A Yeah, I guess you could do that.
Q And 8 percent of $200, would you agree that that's $16?
A Eight percent of $200 is $16, yes.
Q And if the same employee works five shifts in a week, to determine the contribution The Times would make for that week, you would take five times $16; is that correct?
A Correct. Five Times 16 would be 80, yes, sir.
Q And that's the same amount depending on if the calculation is 8 percent of the total wages for an employee who works five shifts in a week or if The Times contributes 8 percent of the wages an employee earns for each shift for the five shifts worked, correct?
A Correct. The only thing that would be missing would be the special equipment work and things like that, though.
We wouldn't have that in that number.

ARBITRATION
You know, the items that are not shift-based they wouldn't get the Pension benefit on.
Q Are you talking about the differential for, for example, a forklift?
A Yes, sir.
Q So that amount wouldn't be included in the calculation of what would be contributed to the Pension Fund; is that correct?
A That would be correct, yes, sir.
Q Let's do one more example. Keep the earnings per shift at $200.
Say the employee works six shifts in a week.
So given what -- your testimony, am I correct that it's your view that The Times would still make the contribution to the Pension Fund as if the employee had worked five shifts in a week, correct?
A That's correct. Yes, sir.
Q So the calculation would still yield an $80 contribution in respect of a week in which an employee actually worked

ARBITRATION
six shifts, correct?
A Correct.
Q Again, if the Times contributed by shift instead for up to five shifts, do you agree that you would obtain the same calculation of $80 that The Times would ultimately contribute to the Pension Fund?
A Could you do that one more time.
Q Sure.
So if The Times contributes by shift for up to five shifts, under this example, you testified earlier that the employee would earn $16 per shift, correct?
A Correct, yes.
Q And five times $16 is $80, correct?
A Correct.
Q And you agree you would disregard the sixth shift for purposes of determining the calculation; is that correct?
A That is correct.
Q So am I correct that for an employee who worked six shifts in a week, if The Times contributes 8 percent of the wages that the employee earned in respect of the

ARBITRATION
first five shifts, that would yield the same contribution as if The Times was contributing 8 percent of the wages that an employee earns per shift but only for the first five shifts, correct?
A Correct. With the exception it's not including some of the other items. I do have that aggregate number.
Q In your affidavit, you wrote that The Times,' quote, percentage contribution rate, end quote, to the Pension Fund is 8 percent."
Is that correct?
A That's correct, yes, sir.
Q Do you have an understanding what the term, quote, contribution rate, end quote, means?
A No, I don't.
Q For The Times' contribution to the Pension Fund in your affidavit and in your testimony, you described multiplying certain earnings by the percentage contribution rate; is that correct?
A That's correct, yes, sir.

ARBITRATION

Q Now, you testified that The Times each month actually contributes money to the Pension Fund; is that correct?

A That is correct. Yes, sir.

Q Do you agree that 8 percent, standing on its own and not multiplied against any other figure or data point, does not yield a dollar amount that The Times can use to determine how much to contribute to the Pension Fund?

A I'm a little confused by that question. If you would repeat it for me.

ARBITRATOR IRVINGS: You can argue that point.

MR. RICHMAN: Yeah.

ARBITRATOR IRVINGS: It's not a factual point. It's an argument.

Go ahead.

BY MR. GARFIELD:

Q Mr. Claffee, you testified you also are generally responsible for payroll for The Times; is that correct?

A That is correct, yes, sir.

Q Can you look at Exhibit 30, please.

ARBITRATION

And I would like you to flip to the last page of the exhibit, please.

A Yes, sir.

Q Bates stamped NYT-49.

A Okay.

Q Now I'm asking about payment of wages now, not contributions to the Pension Fund.

Understood?

A Yes, understood.

Q Employees who participate in the Pension Fund get paid a specified rate per shift in wages; is that correct?

A That is correct.

Q So for working a day, employees earn a specified daily wage?

A Yes, sir.

Q And that wage varies based on the particular shift; is that correct?

A On the day side?

Q Well, the type of -- the description of the shift for working a day varies based on the category of shift; is that correct?

ARBITRATION

A Oh, you are looking at this sheet here?

Q Right. I'm looking at specifically the left-hand column where it lists shifts and there's day, night, Sunday through Thursday, Friday and Saturday.

A Right. I'm with you there.

Q And there are different daily rates that apply to the different types of shifts; isn't that right?

A I thought when you were saying "day," I thought you were talking about the Day column.

Q I'm talking about the vertical Day column, yes.

And my question for you --

ARBITRATOR IRVINGS: The vertical Day column? You threw me off on that. Which one is the vertical Day column?

MR. GARFIELD: I'm looking at the Shift column.

ARBITRATOR IRVINGS: Right. Okay.

ARBITRATION

BY MR. GARFIELD:

Q Going down the list, those are different types of shifts, different; is that correct?

A Well, you have day and then you have night.

Q Correct.

A So you said the day, though. There's only one "day" going across the line. I want to be clear what I'm talking about here.

Q For example, Saturday, compare day and Saturday. There's a different daily rate that an employee is paid in wages if they work a day shift versus a Saturday shift according to this; is that correct?

A Yes, that's correct.

Q Okay. So for The Times to pay an employee's wages, The Times would need to know how many shifts an employee worked and what type of shift they worked; is that correct?

A They would have to know the job, the work he was doing, yes.

Page 86

ARBITRATION
Q And the work that was performed, correct?
A Correct.
Q And The Times would have to know the rate that the employee earned in respect of each of the shifts that they had worked during the pay period; is that correct?
A That is correct, yes.
Q Mr. Claffee, you testified that The Times does not report shifts on the remittance reports that it submits to the Pension Fund; is that correct?
A That is correct, yes, sir.
Q As you also testified, The Times does report shifts in the remittance reports to the Welfare Fund; is that correct?
A For certain Welfare Funds, yes.
Q So for those certain Welfare Funds, shifts are relevant; is that correct?
A That is correct, yes, sir.
Q And that shift information is included on the weekly remittance reports that are sent by The Times to the Welfare Fund; is that correct?

Page 87

ARBITRATION
A Yes, sir. Yes, they are.
Q So it's correct then that The Times has shift information for employees who participate in the Welfare Fund, right?
A Correct. Yes, sir.
Q The Times contributes for the same employees in both the Pension Fund and the Welfare Fund?
A Yes, we make contributions to the Pension Fund and the Welfare Fund.
Q So, Mr. Claffee, if you have the weekly Welfare Fund remittance reports that cover a particular month, if someone wanted to obtain information about how many shifts an employee had worked to use for some purpose related to the Pension Fund, they could use the Welfare Fund remittance reports to derive that information, right?
A I don't think so. I mean, we would be missing some earnings. There's some earnings that are not included. That wouldn't be right. Not the way we do it today.
Q My question is not about earnings.

Page 88

ARBITRATION
My question is only about shift information.
A But I thought you were saying would the report still be correct just based on shifts, correct? Wasn't that the question?
Q Let me rephrase it.
No, the question is: You could add up -- and it might be a little bit approximate with how the month ends -- the number of shifts that an employee has worked over the weeks that cover a month that would be reported on the Welfare Fund remittance reports.
And if someone wanted to understand how many shifts somebody had worked for the purposes of the Pension Fund, they could do that calculation, right?
A Yeah. Well, they couldn't do it based on -- they don't have the same earnings in their accumulator, so they don't match up with the shift-based deduction codes.
So you wouldn't have the same number you would have under the aggregate

Page 89

ARBITRATION
codes under the DELPEN.
So I don't think you would have the same number is what I'm saying. It's a different calculation.
Q How far off do you think it would be?
A I have no idea how far off it would be. It would be a different number is all I'm saying.
Q You testified that no one from the Pension Fund ever complained about The New York Times' contributions?
A To which fund?
Q To the Pension Fund.
A No one's called me and complained about anything, no.
Q No one's ever called and complained about the remittance forms?
A Absolutely not, no. We've been doing it since we transitioned it in 2008. I have no issues with it at all to date.
Q No one from the Pension Fund ever asked you for shift information?
A Absolutely not, no. No one's ever

ARBITRATION

asked me that, no.
Q And that includes Barbara Albergo?
A No.
Q Do you have any understanding if anyone from the Pension Fund office has asked any of your colleagues to include shift information?
A Are you talking about the colleagues, folks I work with in my office?
Q I am, yes.
A Well, I'm the direct contact to the New York Labor Department. Any changes that go through, go through me.
Any requests that come to my team that want to modify a change, it would be escalated to me, which we escalate it to the New York Labor folks before we make any changes.
We're very concerned about making sure we do everything right with the SSC, so we are very, very careful with that kind of stuff, and it definitely would have made it to my desk.
Q So it's your testimony that you're

ARBITRATION

not aware of anyone from the Pension Fund reaching out to anyone at The Times to raise any concerns about the fact that The Times was not including shift information on remittance forms to the Pension Fund; is that correct?
A I can't say that. I don't know what goes on in New York. I mean, in the shop that I work at in Norfolk, Virginia, no one's ever reached out to the team that I work with at the SSC for any pension information. When you say The Times, I can't speak for The Times Company.
Q All I'm asking is for your knowledge, if you have any knowledge that anyone from the Pension Fund has reached out to anyone at The Times, being at the Shared Service Center, being at the Labor Department in New York?
A That question, I have no idea.
Q Do you have any understanding of the term "pensionable wages"?
A Yes.
Q And what is a pensionable wage?

ARBITRATION

A Using my context, the pensionable wages would be the aggregate we use to calculate the DELPEN contribution.
Q So that would refer to, for example, the earning code REG or RGM as a couple of examples; is that correct?
A Yes, that would be some of them.
Q And it would not include the shifts that The Times does not contribute for, such as the CRS code which refers to overtime; is that correct?
A That is correct, yes.
Q So for internal purposes, isn't that correct that The Times tracks shifts worked with respect to the various pension codes that you're referring to?
A We do not track the shifts at all. We aggregate the earnings and multiply that by 8 percent on a monthly basis.
Q The Times contributes to the Pension Fund for employees who haven't actually worked certain shifts; isn't that correct?
A That's correct, yes, sir.

ARBITRATION

Q So take somebody on jury duty, how does The Times know how much to contribute to the Pension Fund for an employee who is on jury duty?
A My understanding -- I don't work at the College Point plant, but at the plant they have a time/attendance system that they would enter that day as a jury duty day, at that employee's rate, and we would receive the rate for that day.
Q So is it your testimony The Times would contribute 8 percent of what that employee's typical day rate is?
A Correct.
Q And how about for Workers' Compensation, how exactly is the calculation made about how much The Times should contribute?
A Well, we go back to the last full 8 weeks that they worked and we get the what we call the 8-week average, and we use that to process the Workers' Comp. benefit.
Q Eight-week average of what?
A Of their earnings.

Page 94

ARBITRATION

Q Of their earnings per day?
A Of their weekly earnings.
Q Is that obtained by taking their average earnings per day and multiplying it times five?
A No. It's taking the total for each of the weeks and dividing that by 8.
Q We spoke about the differential payments for the tractor-trailer employees.
A Uh-huh.
Q How is that differential payment made to employees?
A It has its own earning code.
Q Is it made on a per-shift basis?
A It's made on the work that they do. Whatever type of work that they do, if they're using the tractor-trailer for that work, they would get the differential.
Q If they work on the tractor-trailer for a day, then they would get the differential?
A I'm not really that clear on exactly whether it's ...
Q Okay.

Page 95

ARBITRATION

MR. GARFIELD: Mr. Arbitrator, I would like to show the witness one of the exhibits -- it's 18, but it's in the objected.

MR. MILLER: Objected Exhibit 18?

MR. GARFIELD: Correct.

ARBITRATOR IRVINGS: I don't know where my Objected folder went. Thanks.

MR. MILLER: Mr. Arbitrator, we object to the use of this document and its introduction into the record.

ARBITRATOR IRVINGS: And the basis is that you don't have either of the people.

MR. MILLER: The basis is that, indeed, we do not have either of the people to testify as to the context for this document.

The document makes reference to, I believe, accrued benefits. The second full sentence refers to checks representing accrued benefits. That's a

Page 96

ARBITRATION

phrase that is not reasonably understood in the context of pension contribution, so we really have no context here for the reason for this letter and the language used in this letter.

And we will not have the ability to examine the author of the letter nor the understanding of the recipient of the letter.

ARBITRATOR IRVINGS: Do you want to ask some background questions to see whether you can -- I'll allow you to at least start that way to see whether this person has any knowledge about it.

MR. GARFIELD: Whether Mr. Claffee has any knowledge about it?

ARBITRATOR IRVINGS: Uh-huh.

MR. RICHMAN: We can start that way, but the point here is that this is a document that came from the director of Labor Relations of The New York Times.

It's really the first sentence of

Page 97

ARBITRATION

the document on the first page that is the critical issue. It's self-explanatory.

I understand why --

ARBITRATOR IRVINGS: He can argue whether that point is established.

But go ahead.

It's clearly your position that it's self-explanatory.

MR. RICHMAN: I don't know how someone can read that and say -- it says what it says, right.

MR. MILLER: Mr. Arbitrator, can I be heard on that issue?

ARBITRATOR IRVINGS: Uh-huh.

MR. MILLER: The second sentence provides some context or attempts to provide some context to the payments and the contributions and uses the phrase "accrued benefits." And there's certainly been no testimony thus far, nor would I assume any testimony that could be

ARBITRATION

brought to bear, to demonstrate the relationship between accrued benefits and pension contributions.

This may be a one-off arrangement. We simply have no idea, and we do not have the ability to test those who may -- those who authored this letter and those who helped them.

There's mention of ccs. We don't know who these individuals are.

Mr. Schwartz is not available. Mr. Garfield, I guess, could attempt to lay a foundation, but I think at the end the day, the foundation is going to go nowhere because none of the individuals who really understand the context for this letter will be able to provide that context to you.

MR. GARFIELD: Mr. Claffee's testified that the process for these contributions has remained the same during an extended period of time that encompasses the date that this letter was sent. And I'd like to ask

ARBITRATION

Mr. Claffee if he has any understanding why The New York Times would have sent this letter to the Pension Fund office.

ARBITRATOR IRVINGS: As I said, you can start with your questions.

Go ahead.

BY MR. GARFIELD:

Q Mr. Claffee, would you take a look at the first page of Exhibit 18 in the "objected to" binder.

A Just the first page?

Q That's all I'm going to ask you about.

A Okay.

Q Do you have any understanding as to why Mr. Baker would have referred to shifts in respect of contributions for somebody who was out on Workers' Compensation in a letter to the Pension Fund office?

A I have no idea at all.

Q Does this contradict your understanding of how The Times contributes for employees who are out on Workers' Comp.?

ARBITRATION

A It does. We base it on wages, the eight-week average of wages. The last full eight weeks they work is how we currently do it. As far back as I can go, I think we went back to 2001, but we have been doing it that way for quite some time.

Q So your understanding is the contributions with respect to employees on Workers' Comp. have nothing to do with shifts?

A Not as far as I know, they are not. We use wages and we multiply it by 8 percent.

Q So you think this letter is incorrect?

A For the way I do it today, yes. I would not have worded it that way. I would have taken wages times 8 percent.

ARBITRATOR IRVINGS: Okay. I'm willing to accept the document.

You can make your arguments as to what it does or doesn't prove. And it will become 116.

(Exhibit Exhibit 116, was

ARBITRATION

received in Evidence.)

ARBITRATOR IRVINGS: I'm taking the letter and the pages behind.

Thank you.

BY MR. GARFIELD:

Q Mr. Claffee, if the contribution to the Pension Fund was based on wages, as you are testifying is the case, would it yield a different dollar amount than if the contribution was based on shifts?

A We're talking about Workers' Comp. cases?

Q Yes, still on Exhibit 116.

MR. MILLER: Your question continues to relate to the exhibit?

MR. GARFIELD: That is correct.

MR. MILLER: I'm sorry. I thought we had moved on.

ARBITRATOR IRVINGS: No problem.

THE WITNESS: I'm sorry.

(Requested portion of record read:

"Q. Mr. Claffee, if the contribution to the Pension Fund was

ARBITRATION

based on wages, as you are testifying is the case, would it yield a different dollar amount than if the contribution was based on shifts?")

(End of read-back.)

MR. MILLER: Mr. Arbitrator, can I lodge an objection here?

I must say that I did not think the question related to this document precisely because there's been simply no foundation laid that this witness knows anything about this document and the context behind this document.

So I'm not sure -- I don't understand the question as it may or may not pertain to this document, and, to the extent that it does, there's certainly no foundation that's been set forth to justify this question with this witness who knows nothing about it.

ARBITRATOR IRVINGS: Go ahead.

You can ask foundation questions to see whether he has any of the requisite knowledge to answer that question.

ARBITRATION

BY MR. GARFIELD:

Q Are you aware of a situation in which The Times has ever made contributions to the Pension Fund for an employee who was on Workers' Comp., using shifts as the basis to calculate the amount that should be contributed?

A Not as long as I've been doing it, no. We've used wages consistently throughout.

Q Last question about this exhibit.

Who is James S. Baker?

A James worked in the Labor Department up until a couple years back and retired.

Q Did he hold the position that Terry Hayes now holds?

A No.

Q Did he report to Terry Hayes?

A I would guess he does. I don't know off the top. Terry, as far as I know, is the head of the department.

Q Okay.

MR. GARFIELD: I have another

ARBITRATION

objected to. Objected Exhibit Number 20.

MR. MILLER: If I might, Mr. Arbitrator, we lodged an objection to this exhibit based on untimeliness where I alluded to that yesterday in our call.

The exhibit lists were due to be and were exchanged by the parties over a week ago. I believe it was a week ago today. And this document was not on it. And, in fact, we did not know about the Fund's intent to add it to the witness list and ask witnesses questions about it until yesterday. By that juncture we had already spoken with several witnesses and helped prep them.

And so we lodge an objection on the timeliness and the prejudice emanating therefrom.

MR. GARFIELD: Mr. Claffee was not on our witness list. Based on his deposition testimony, we didn't expect that he would be on The Times'

ARBITRATION

witness list either.

After The Times advised us that they planned to call him, we reviewed the transcript -- this is an e-mail that he was copied on. He was asked about it during his deposition. We don't believe there any prejudice to The Times in asking about this.

And, moreover, I can use the document to impeach Mr. Claffee based on earlier testimony that he gave, if the primary basis to just use it as an exhibit is not accepted.

MR. MILLER: May I respond?

ARBITRATOR IRVINGS: Uh-huh.

MR. MILLER: We provided our witness list to the Fund indeed the same day we provided our exhibit list, so the Fund was aware of Mr. Claffee being a witness for a good week and, nonetheless, this came in a week later.

And my understanding is that as it relates to documents that might be used

ARBITRATION
to impeach, we have an exhibit list and those are the exhibits in this case. And the parties are not allowed, unless an exhibit is otherwise admitted, to freely use exhibits that we were not aware of for impeachment purposes.
ARBITRATOR IRVINGS: Well, my understanding of providing exhibit lists is that you are providing that which you are going to introduce in your case-in-chief, not for cross-examination.
And it does appear to be a document that was addressed during his deposition.
MR. MILLER: It was.
ARBITRATOR IRVINGS: Okay. So I'm allowing it.
Go ahead.
MR. GARFIELD: Thank you.
ARBITRATOR IRVINGS: This will be 117.
(Exhibit Exhibit 117, was marked in Evidence.)
ARBITRATOR IRVINGS: Go ahead.

ARBITRATION
BY MR. MILLER:
Q Mr. Claffee, you have before you what's you now been marked as Exhibit 117.
Do you see that?
A Yes, sir.
Q And can you tell me what this document is?
A This is an internal document the SSC prepares for the New York Labor Department.
Q The first page is an e-mail that you were copied on; is that correct?
A Yes.
Q And the second two pages attach a spreadsheet; is that correct?
A Correct, yes.
Q Can you look at the bottom of the -- I know it's difficult to read -- each of the three charts that appear on the second and third pages.
And you see there is a reference to pensionable and nonpensionable?
A Yes, sir.
Q Earlier I asked you whether

ARBITRATION
The Times tracks the number of shifts that employees work or do not work for the Pension Fund, and you said that they do not.
Do you recall that testimony?
A Yes, sir.
Q Is your answer still the same to that question?
A Yes, it is. I mean, basically, this is the report that we develop for the Labor Department in New York, and what they use it for, I don't really know.
Q That's not my question. My question is: Does The Times track shifts worked by earning code for the Pension Fund? I'm not asking about the --
ARBITRATOR IRVINGS: I'm sorry. Your question is what?
MR. GARFIELD: Does The Times track shifts worked or not worked by earnings code for the Pension Fund.
A I'll repeat. This is an internal document. We don't use this at the SSC for any purposes whatsoever other than to provide information to The New York Times

ARBITRATION
Labor Department.
Q Do you agree that at the bottom of each column it has a pensionable and nonpensionable figure with respect to the types of shifts that are listed in the column above?
A I would agree with that, yes, absolutely.
Q I think you testified earlier it's your understanding that the pensionable would refer to shifts on which contributions are made to the Pension Fund; is that correct?
MR. MILLER: Objection. I think that mischaracterizes his testimony.
ARBITRATOR IRVINGS: I agree. I believe it related to earnings that were --
MR. GARFIELD: To earnings -- let me rephrase the question.
BY MR. GARFIELD:
Q You testified -- withdraw the question.

ARBITRATION

MR. GARFIELD: Can I see the question before that, please.

Q I think you testified earlier, Mr. Claffee, that it's your understanding that the "pensionable" refers to earnings or earning codes on which contributions are made to the Pension Fund; is that correct?

A That is correct, yes, sir.

Q What's your understanding of what "nonpensionable" refers to?

A The sixth shift would be nonpensionable.

Q So The Times, according to this document, knows how many shifts are pensionable and how many shifts are nonpensionable; is that correct?

A Correct.

Q Mr. Claffee, if an employee works a sixth shift during the eight-week lookback period for purposes of Workers' Compensation, would the contribution that The Times makes to the Pension Fund include the sixth shift at a higher rate?

A No, it would not.

ARBITRATION

MR. GARFIELD: I have no further questions for Mr. Claffee. Thank you.

THE WITNESS: You're welcome.

MR. MILLER: Let us just talk for two minutes. There may be a very, very brief redirect.

ARBITRATOR IRVINGS: Let me make sure I understand.

For the eight-week average earnings figures, would a sixth shift -- earnings during a sixth shift at any point in that eight weeks be included or not included?

THE WITNESS: Not.

ARBITRATOR IRVINGS: And might as well ... for the DELCON, for the Welfare contributions that are --

MR. MILLER: DELCOL.

ARBITRATOR IRVINGS: DELCOL, I'm sorry.

What happens for shifts where there's bereavement leave, jury duty, vacation, sick pay?

THE WITNESS: They count.

ARBITRATION

ARBITRATOR IRVINGS: Okay. Thank you.

THE WITNESS: You're welcome.

MR. RICHMAN: Can I just ask for a clarification?

ARBITRATOR IRVINGS: Yes, you may.

MR. RICHMAN: "They count." Does that mean a sixth shift count?

THE WITNESS: Can you please repeat? You caught me in the middle there.

ARBITRATOR IRVINGS: Go ahead.

MR. RICHMAN: The question is, when you just answered the question "They count," it talked about various types of paid leave. I wasn't sure exactly the question you were answering.

Is it your testimony that a sixth shift would count for the calculation of the contribution to DELCOL?

THE WITNESS: The shifts are capped at five per week.

(Pause.)

ARBITRATION

REDIRECT EXAMINATION BY MR. ROTH:

Q Mr. Claffee, Mr. Gutterman asked you a couple of hypotheticals involving what the contribution will be for a certain employee who had worked a certain number of shifts and so on.

I just want to ask you a couple of similar hypotheticals.

So first, if you had an employee who worked four shifts and then took one personal day and let's say, just keeping with the numbers we used before, was paid $200 for each of those shifts and was also paid $200 for the personal day for a total earnings for the week of a thousand dollars.

How would you calculate the pension contribution in that situation?

A We would take the five days at $200 per day times -- five times 200 is a thousand and multiply that by 8 percent to come up with the contribution of $80 for that week.

Q And had you instead made the 16-dollar per shift contribution that was

ARBITRATION
discussed earlier for the four shifts that were worked, what would the result of that calculation have been had you done it that way?
A Just done the four shifts they worked, it would be four times $200 which would total to $800. Then I would take the $800 times 8 percent and that would be a 64-dollar contribution for that week.
Q Thank you.
And then one other hypothetical. Assume you have a salaried foreman. You testified earlier general foreman are paid on a salary basis.
Assuming you have a foreman who was paid a thousand dollars a week, what would the Pension contribution be for that foreman for that week?
A It would be $1,000 times 8 percent, so it would be $80.
Q How, if at all, would that calculation change if the foreman had worked let's say only three shifts that week?
A We don't calculate the shifts for

ARBITRATION
the foreman. We just pay the foreman a salary, so he gets that contribution regardless.
Q Does the contribution for the foreman change from week to week?
A No. They're salaried.
Q And then you had discussed earnings codes and some shift codes, so let me ask you: Which, if any, earnings codes that count for pension purposes do not have a shift number attached to them?
A I mean, off the top of my head, I would say military pay, the special equipment pay don't have any shifts associated with it.
Q And do The Times make Pension contributions based on those earnings codes?
A Yes, we do.
Q If an employee is out on military and earns military pay, does The Times make any DELCOL contributions to the Welfare Fund for that employee?
A No. There's no shifts involved with the military pay. It's just earnings.

ARBITRATION
Q Then there were a couple questions about whether the Pension Fund office had ever asked The Times to report shifts in its remittance reports.
If someone from the Fund office had called not you but let's say someone in The New York Times Labor Department and they wanted to make that change, let's say, who would ask to implement that change?
MR. GARFIELD: Objection. I don't know that he has any foundation to answer that question.
BY MR. ROTH:
Q Would someone in the Labor Department have independently been able to change the reporting system for the remittance reports to the Pension Fund?
MR. GARFIELD: Same objection. I think it's linked to the prior question which I objected to.
ARBITRATOR IRVINGS: Are you asking sort of who does the administerial functions of changing things?

ARBITRATION
MR. ROTH: Yes.
THE WITNESS: I can answer that.
MR. ROTH: Yes.
A I do. I mean, I would have to do it.
Q Okay. And then the last question.
If you can turn back to Exhibit 117 -- or I believe it was 116, the letter that we had discussed.
A I didn't put it in the binder yet.
Q Oh. It's this one here.
Prior to this case, this arbitration, have you ever seen this letter before?
A No, I've never seen this letter before.
MR. ROTH: Thank you.
That's it. No further questions.
MR. GARFIELD: I have just one question.
RECROSS EXAMINATION BY MR. GARFIELD:
Q Mr. Claffee, does The Times make contributions to the Pension Fund in respect

ARBITRATION

of personal days taken by employees?

A Yes, we do. It's included in the aggregate number.

Q And on what basis or how does -- withdraw.

How does The Times know how much to contribute in respect of a personal day taken by the employee to the Pension Fund?

A We contribute 8 percent of whatever those day's earnings were.

Q If it's a personal day, what do you mean by the "day's earnings"?

A They have a schedule at the plant that's in the time and attendance system. Whatever their normal shift is, if they're taking a personal day, their work day is where they would get that personal day.

Q What they normally get paid for working a day; is that correct?

A Correct.

MR. GARFIELD: Okay. No further questions for us.

MR. MILLER: No further questions.

ARBITRATION

ARBITRATOR IRVINGS: Thank you very much.

(A luncheon recess was taken at 12:51 p.m. through 2:02 p.m.)

TERRY L. HAYES,
having been first duly sworn
by Arbitrator Irvings, was examined
and testified as follows:

DIRECT EXAMINATION BY MR. MILLER:

Q Good afternoon, Mr. Hayes.

Can you state your full name and place of residence for the record.

A Yes. My name is Terry, middle name, Lee, last name Hayes. I reside in New York City.

Q And where are you employed?

A New York Times Company.

Q And what is your current position at The Times?

A I'm senior vice president of Operations and Labor.

Q How long have you held that position?

A I've held that position since July

ARBITRATION

of 2009.

Q And what did you do before becoming senior VP for Operations and Labor at The Times?

A I originally came to The Times in 2006, July of 2006, and I came in as vice president of Labor Relations.

Q Can you provide the arbitrator a short summary of your work history prior to being employed at The New York Times.

A Out of college I went to work for the airlines. Started with Ozark Airlines in 1974. Ozark was merged into TWA, later TWA was merged into American, so I kind of followed that track.

Then shortly after 9-11 in 2001, I left the airlines for a period and went to work for the Transportation Security Administration, TSA. I stayed there for a couple years.

Then in 2003, I went back to the airlines. I went to work for Delta and I was with Delta until 2006 when I came to The Times.

ARBITRATION

Q And in connection with your airline work, in what area of airline operations were you employed?

A In the airlines, I was in charge of operations, labor relations and human resources.

Q So for roughly how many years have you been involved with labor relations?

A Oh, over 30.

Q Can you briefly describe to us what the responsibilities are of the senior vice president for Operations and Labor at The New York Times?

A At The Times my responsibilities include newspaper production, magazine production, both T Magazine, the weekly magazine that appears in the Sunday paper; Safety, security, building operations, all the real estate that The Times has around the world; and labor relations.

Q I'm now going to ask you a series of questions about your service on boards of trustees of benefit funds.

Do you sit on any boards of

ARBITRATION
trustees for multiemployer pension or welfare plans?
A Yes, I do.
Q And which ones?
A I sit on the Fund for the New York Guild, Newspaper Guild, both Pension and Welfare.
And I also sit on the MDU, both Pension and Welfare.
Q And NMDU would be the Newspaper and Mail Deliverers-Publishers Union?
A The Newspaper Mail and Deliverers Union, yes.
Q Thank you.
And the Pension Fund is called the Newspaper and Mail Deliverers'-Publishers' Pension Fund?
A Yes.
Q And that's the Pension Fund in connection with this arbitration, correct?
A That is correct.
Q And when did you join the board of trustees for the NMDU Pension Fund?
A I joined in 2007.

ARBITRATION
Q And who are currently the other trustees on that Fund?
A There is a another management trustee on the Fund from one of the other publishers as well as two trustees from the Union.
Q Who is the other management trustee?
A Just slipped my mind. Sorry. I went blank.
Q That's all right.
Is he a recent appointee?
A Yes.
Q Very recent appointee?
A Very recent.
Q And who are the Union trustees of the Fund?
A Mr. Setteducato and Mr. Tommy Bentvena.
Q In your role as trustee of the Pension Fund, have you had any involvement in the trustees' decisions in connection with the assessment of partial withdrawal liability against The Times?

ARBITRATION
A No, I have not.
Q So you have not attended any trustee board meetings where that issue was discussed?
MR. RICHMAN: Objection.
ARBITRATOR IRVINGS: What's the objection?
MR. RICHMAN: It's leading.
BY MR. MILLER:
Q Have you ever attended trustee board meetings in which the issue of assessment of withdrawal liability against The Times was discussed?
A No, not in my presence.
Q Has there been a process that has been employed by the trustees at these meetings so as to assure that you will not be involved in any such discussion?
A During meetings when we were having pension meetings, they wanted to discuss that particular issue, sometimes it was during the middle of the meeting, sometimes at the end, I was asked to leave. I was recused from those meetings.

ARBITRATION
Q Roughly, how many meetings have you attended of the trustees in which during the course of the meeting you've been asked to step out and recuse yourself?
A Most all the meetings leading up to the assessment letter.
Q Since approximately what year?
A Since about the beginning of 2009.
Q Until when, sir?
A Until the assessment letter came which was around 2013.
Q In light of these recusals, do you possess any confidential or privileged information about the Pension Fund's actions in connection with the assessment of withdrawal liability against The Times that you acquired through your service as trustee?
A No, I do not.
Q I'd now like to ask you a series of questions about an entity known as C & S.
Do you know what C & S is?
A Yes. C & S was City and Suburban Wholesaler. It was a wholly owned

ARBITRATION

subsidiary of The New York Times.

Its business was distributing mostly retail location papers for not only The Times but for some of the other publishers in the City.

Q When you started at The Times in July 2006, how was C & S doing financially?

A When I joined The Times in 2006, there was already a senior team that was discussing C & S. They had been discussing C & S for several months before I arrived.

The assessment was clear that C & S was not doing well, and so we were trying to come up with a solution for the C & S problem.

Q And you mentioned the assessment. Would that be the -- that was the assessment of whom?

A It was the assessment of the management team that was working through the process.

We looked at every option we could think of in dealing with the C & S financial issue.

ARBITRATION

Q What did that team conclude about C & S's viability?

A That team concluded that C & S was not a viable company during our assessment.

We shared that information with our senior management and also with the leadership of the Union.

We talked to the Union and advised them that they might want to hire an analyst to come in. And under an NDA we shared sensitive information about the company, financial as well as operational.

And he came back to the team, both the management team and the Union team that were in the room together, and his assessment was, basically, he looked at the Union and told them even if they drove for free, it was not a viable company.

Q And this was the assessment of the Union's financial consultant?

A Yes, it was.

Q What did The Times decide to do about C & S following the team's assessment?

A Following those meetings, we met

ARBITRATION

with, again, our senior management to brief them on what those discussions had brought. And this was about the beginning of June of 2008 we had those discussions. Discussions with the Union took place during the summer.

So it was determined that C & S should be closed, and we made a decision that we would publicly announce that in September of 2008.

Q How was The New York Times doing financially during this time period?

A The New York Times, like most publications, most newspapers, we were really going through a really tough time with the advent of the e-readers and the Internet and that entire thing that continues today to give us problems.

So we were having a really tough time. We were losing subscribers. They were losing advertisers, so it was pretty tough.

Then you throw on top of that the economic situation in general because we were in the midst of the meltdown during

ARBITRATION

that period of time. So getting your hands on operating capital was pretty tough.

Q What steps did The New York Times have to take to implement its decision to close C & S?

A Once we decided to close C & S and made that public, we knew that we would have to sit down with the NMDU and discuss a wind-down proposal and plan that would do several things.

Number one, we wanted to maintain the business we already had. It was already in terrible shape but we wanted to protect what we did have left. And we also wanted to come up with a plan that would treat the employees fairly during the wind down.

Q What was your understanding, if any, about The Times' contractual obligations to C & S employees in the event of the C & S closing?

A Under the C & S contract, we had an obligation to the C & S regular situation holders, which were the regular C & S employees who had been employed by C & S for

ARBITRATION

more than one year, to give them eight weeks of pay as their severance.

Q And notwithstanding the contractual obligations, was The Times prepared to negotiate a package beyond those contractual obligations?

A As I said, we wanted to maintain the business, we wanted to protect the business that we had, and we were prepared to give the employees a greater severance package covering more employees than we were contractually obligated to do.

Q And let's discuss and why don't you summarize in general terms what issues were discussed with NMDU as part of these negotiations.

A We discussed various issues. As I said, it was important to us to maintain the business. It was important to the Union that we treated the employees fairly, giving them something that would help them get a softer landing than what's called for the contract.

And also they were most interested

ARBITRATION

in our trying to hire in to The Times operations as many employees as they could get us to take.

It was our original thought that we really didn't want to take hardly any employees. We were kind of exiting that business. So as part of the cost savings that we were going through at the time, it was our impression not to take any of those employees.

However, during the negotiations, it became very clear to us that this was a cornerstone issue for the Union that we hire some of these employees.

Q And so as a consequence of this being a cornerstone issue for the Union, what was eventually agreed to?

A After several months of discussion, we had identified a business plan that made sense for us to hold on to that we could justify where we would keep certain Manhattan retail distribution outlets under our control.

So what we ended up coming up with

ARBITRATION

was a plan that gave the company the option to, if there were less than eight copies of papers sold during a week as an average, we could give that work to anybody else. If it was less than eight copies during the week, we could give that work away.

So based on the construct such as that, we identified locations that had eight or more, and those we kept inside The Times. And we hired employees from C & S to do that work.

Q And were pension costs a consideration that The Times were mindful of in these negotiations?

A When we initially put together our plan, it was our plan not to hire any employees.

So part of our cost structure when we were figuring out what the cost of winding down C & S was, we had built in a withdrawal possibility, a partial withdrawal possibility.

That number was totaled about 15 million which was 12 million for the NMDU

ARBITRATION

plan -- and C & S was part of a wholesaler plan, so we had identified $3 million that would be associated with that.

Now, when we were going through the process of determining if we were going to hire employees or not, we realized that their desire for us to hire employees would address the issue of withdrawal liability.

So that was when we decided we'd go forward with that, then that affected what those withdrawal liability numbers were.

Q Okay.

And how would the hiring of C & S employees at The Times, how would that address the issue of withdrawal liability?

A Hiring enough employees from C & S at the rate that was The New York Times rate, because the C & S rate was less than The Times wage rate. So hiring them at The Times in the right numbers with the correct Times pay rate and wage rate would keep us above that level where we would pick a partial withdrawal.

Q And did The Times model how many

ARBITRATION
C & S employees would be needed to potentially avoid or, rather, prevent -- strike that.
Did The Times model how many C & S employees The Times would need to prevent a partial withdrawal?
A The driver was how many employees did it take to get the job done. And so we figured that it would be somewhere between 58 and 60 employees that would kind of get us to that level.
So, yes, we did model that. And those numbers coincidentally worked out.
Q And what was your understanding at that point in time of the relevant unit for measuring whether a 70 percent decline might occur?
A It was the percentage of wage.
Q It was wages?
A Wages.
Q And what did your estimates or projections show in that regard respecting hiring needs to keep wages above the 30 percent mark?

ARBITRATION
A When we began the negotiations and once we started really talking about taking on employees, our proposals initially were to pay them at C & S rates. And the Union, of course, wanted a higher number. I think they were near 80 people at one point that they wanted us to take.
Eighty, of course, didn't fit into the business plan of the modeling of work that we needed to have done, so we ended up agreeing to 65 folks at The New York Times rates.
Q I'd now like to turn your attention to Exhibit Number 55, which I think is in the second binder.
A Yes.
Q Do you recognize this document?
Do you recognize this document, sir?
A Yes. This is the C & S closing agreement.
Q And can you read into the record the first sentence of Paragraph 2A of this document.

ARBITRATION
ARBITRATOR IRVINGS: It is in the record.
MR. MILLER: Yes. All right.
BY MR. MILLER:
Q Can you focus on the first sentence of Paragraph 2A of this document?
A Yes.
Q Did The Times ultimately hire 65 C & S employees pursuant to this agreement?
A Ultimately, we hired a total of 68. So what we hired was the 65 in accordance with the agreement, and the hiring was done in seniority order. So we needed some supervision also for this group, so we ended up hiring an additional three people from C & S.
So the total number was 68, at the end of the day.
Q And what was your expectation based on these hirings as to whether The Times' contribution base units with respect to the Pension Fund would not decrease by 70 percent?
MR. RICHMAN: Objection.

ARBITRATION
Leading.
MR. MILLER: I can rephrase.
ARBITRATOR IRVINGS: Please.
BY MR. MILLER:
Q Based on these hires, did The New York Times have any expectations about the impact of these hires on the prospect of a partial withdrawal?
A Yes. We felt with these hires at The New York Times rates of pay, that we would not have a partial withdrawal.
Q Do Times drivers get paid the same wage as C & S drivers, or did they at the time?
A No, they did not.
Q What was the significance of the wage differential between The Times and C & S in connection with expectations about these hires?
ARBITRATOR IRVINGS: I'm not sure I understand the question.
MR. RICHMAN: It's leading, anyway.
MR. MILLER: I'll rephrase.

ARBITRATION

ARBITRATOR IRVINGS: Go ahead.

BY MR. MILLER:

Q Was there a significance about the wage differential between The Times and C & S in connection with The Times' consideration about hiring and the possibility of partial withdrawal?

A Yes. As I stated before, the wage rates were higher at The Times. And when we brought these employees over, we raised their rates from the C & S rates to The Times rates, so the overall average rate, wage rate was higher for The Times' contributions.

Q And now I would like you to turn your attention to Exhibit 38.

A Okay. I have it.

Q Do you recognize this document, sir?

A Yes. This is a Form 8-K/A filing for The New York Times Company.

Q What is an 8-K/A?

A An 8-K/A is, if you will, an amendment to a prior filed 8-K.

ARBITRATION

Q And was there a prior filed 8-K in connection -- strike that.

Let me lay a better foundation.

This 8-K/A filing was in connection with what event, sir?

A Yeah. Several lines down -- this is -- there is a date here of September 8th. That's a rounded date that we announced the closing of C & S.

So this 8-K/A represents an update at some point of the original filing of the 8-K that was tied to the closing of C & S or the announcement of the close.

Q And did The Times file an 8-K regarding the closure of C & S?

A Yes, they did.

Q What was purpose of the 8-K/A, the amendment to the original 8-K filing, in connection with the closing of C & S?

A It was to update any information that may have changed from the original filing, because we have to give the most up-to-date and most correct information that we can in our filings.

ARBITRATION

Q And when was this amendment, this 8-K/A filed?

A This 8-K/A was filed on December 2, 2008.

Q And what was the relationship between the filing of this 8-K/A and any closing agreement that you had reached with the Union in connection with the C & S --

MR. RICHMAN: Objection. Leading. Was there a relationship --

MR. MILLER: I'm asking for -- I can easily lay the foundation.

BY MR. MILLER:

Q Was there a relationship between the filing of this amended 8-K and the closing agreement that had been reached respecting the closing of C & S?

A Yes. By December 2, 2008, we had negotiated the closing agreement. The document had been signed, the document had been ratified by the Union.

Q Mr. Hayes, can you turn your attention to Section 2.05 of this document. It's on the second page. It's the

ARBITRATION

page entitled at the bottom NYT-000486.

A Yes.

Q Do you see Section 2.05?

A Yes, I do.

Q And what is the purpose of that paragraph?

A That paragraph, as stated in its heading, "Costs associated with the exit or disposal activities."

This is totally regarding the C & S closure, and this is going through the numbers of what those estimates and costs may be.

Q And what did Section 2.05 indicate the costs would be to The Times of closing C & S?

A The cost to closing C & S was between 48 and 53 million of which 30 million was associated with the staff reduction which included any type of withdrawal liability that there may be.

Q And do you have an understanding as to whether the estimated cost in this 8-K/A in Item 2.05 reflected The Times' judgment

Page 142

ARBITRATION
of any withdrawal liability to the NMDU Fund?
A Yes.
Q And what is that understanding?
A That understanding was that there would be no withdrawal liability from the NMDU Fund.
However, there was a small withdrawal for the Wholesaler Fund of about 3 million.
Q And is the Wholesaler Fund related to the NMDU Fund?
A No, it's not. Totally separate.
Q I'd now like to draw your attention to Exhibit 54.
A Okay. I have it.
Q Do you recognize this document?
A Yes. This is an internal document that we used when we were forecasting the cost of the C & S closure.
Q And does this internal document -- strike that.
What is the relationship between this internal document and the disclosures

Page 143

ARBITRATION
that were made in the 8-K and 8-K/A, if any?
A This was the backup document that we utilized to feed what was ultimately placed into the 8-K.
This is our financial backup.
Q I'd like you to turn your attention to the last page of this document, the page that's entitled at the bottom right NYT-000717.
Are you at that page, sir?
A Yes, I am.
Q Looking to the last page of the document, what does this say across the line that's entitled Potential Withdrawal Liability?
A Yes. This document states that at this point in our preparation that there was a 15 -- and the 15 is in millions -- there was a 15-million-dollar partial withdrawal liability that we booked at this point.
Q And what do the next columns say under the heading 8-K Filing Low, 8-K Filing High?
A Those both say at this point TBD,

Page 144

ARBITRATION
to be determined.
Q And which, if any, of the 8-K or 8-K/A filings would the Number 15 million on the last page have been reflected in?
A The change to this would have been reflected in the final backup to the final document because then we would be able to fill in the TBDs.
Q And thus now I'd like you to turn your attention to the first page of this document, the one that is entitled on the right NYT-000713.
And how was this first page different from the last page of the document?
A This page has now removed the TBDs, and they've replaced them with numbers, if you will.
So what this says now under the Potential Withdrawal Liability is the original number was 15 million. Now there's a range that we've added, a low range and a high range.
The low range is zero, the high

Page 145

ARBITRATION
range is 3 million.
What that represents is we now know that we have a signed agreement with the Union and it's been ratified, so the numbers that we can place in here now are our best estimate of what our withdrawal liability would be.
Q And does this document contain a description relating to The New York Times' assumption about withdrawal liability for the NMDU plan?
A Yes, it does.
It states that it assumes no withdrawal liability for the NMDU plan and a minimum withdrawal for the C & S plan.
The C & S plan was a wholesaler plan.
Q That you referred to earlier?
A That's what I referred to earlier.
Q And what is the date on this document, "this document" being the Page 1 of this exhibit?
A This document is dated 12-1-2008.
Q And, again, what is the timing or

ARBITRATION

temporal relationship between 12-1-2008 and the date that the closing agreement regarding C & S had been signed and ratified?

A Again, this is post ratification, so we know what the numbers are. And this document indicates that.

Q And why, if any, reason were you able to make the determination that you memorialized on the front page of this first page of the document in connection with withdrawal liability expectations for the NMDU plan?

A Yes. Based on our calculations and the wages that we were paying the employees that came over from C & S, we were sure that we would not take a partial withdrawal.

Q And, indeed, what does it say, if anything, about The Times' belief in the accuracy of the dollar figures for the cost of the C & S closing that it put those dollar figures in its 8-K/A filing?

ARBITRATOR IRVINGS: You can argue that.

ARBITRATION

MR. MILLER: Okay.

BY MR. MILLER:

Q Would the judgment of The Times about the potential for withdrawal liability to the Pension Fund have been different had you believed that a different relevant unit applied to determine CBUs and the potential of a 70 percent decline?

A Yes. We would have made other choices other than the ones we did.

Q And if you had believed that the relevant unit for measuring the 70 percent decline was shifts, what would you potentially have done?

A I could have gone with the higher number that the Union wanted me to hire, just accept their number. That would have gone a long way to solve that problem, or, conversely, since we knew -- since we had figured out what our withdrawal would be, we may have decided not to hire any.

Q And why would you have potentially done something different if you had understood that CBUs was shifts rather than

ARBITRATION

wages?

A Because of the wage differential between The Times and C & S, I mean, the numbers were just different.

As far as shifts were concerned, there was no way that there could be that balance because there are just a lot of people at C & S, so you didn't have that wage arbitrage that you could deal with.

Q And what was the basis for your understanding and belief that CBUs were wages rather than shifts back during this time in late 2008/early 2009?

A All the documentation that I had seen: Letters from the Union, a letter between the bargaining parties, letters between the Fund and the Employers, everything talked about the percentage of the wage. So it was very clear to me that that was it.

Q Did the Union ever communicate with The Times in a manner that referred to pension contribution rates as a percentage?

A Yes.

ARBITRATION

Q And can you describe those communications?

A Yes. Inside of one of the agreements, the Union had negotiated the ability to move up to 2 percent of the wages from Pension to Welfare. And that was negotiated back in the late '90s, I believe.

Q Can I draw your attention so we can elaborate on this a little bit, so Exhibit Number 60.

A Yes, I have it here.

Q Mr. Hayes, do you recognize this document?

A Yes. This is a Memorandum of Agreement from 1992.

Q And this Memorandum of Agreement is between The New York Times and whom?

A And the Newspaper and Mail Deliverers Union, the NMDU.

Q And can you turn to the page marked FUND-0001111, which is also Page 14 of the MOA.

A Yes.

Q And can you review and briefly

ARBITRATION
summarize your understanding of the
paragraph marked D.
ARBITRATOR IRVINGS: One
moment. Let me read it, please.
BY MR. MILLER:
Q Mr. Hayes, go ahead and summarize.
A Paragraph D sets up, if you will,
an agreement that allows the Union to
reapportion those percentages of wages
between the two funds as long as the total
contribution between the two funds was not
greater than 15.68 percent.
Q And what did this language imply to
you about the basis for The Times'
contributions to the Pension Fund?
MR. RICHMAN: Objection.
ARBITRATOR IRVINGS: You are
asking him for opinion, an argument.
He could testify as to if he knows
how it's implemented, but to the extent
this all happened before he was there,
you are simply asking for him to
interpret a document which you can do
just as well, I'm sure.

ARBITRATION
MR. MILLER: We will attempt to
do so at the appropriate time,
Mr. Arbitrator.
BY MR. MILLER:
Q Do you have an understanding of
whether the Union ever exercised this right
to move contributions?
A They absolutely did.
Q Now let me direct your attention to
Exhibit 6.
And, Mr. Hayes, what is this
document?
A This document is a letter from
Stephen Goldstein, who at the time of this
writing was the secretary/chair of the NMDU
as well as a trustee.
And it's a letter to Thomasina
McMillan who was our manager of payroll.
Q What is the date of this letter?
A January 22, 2008.
Q And you were indeed employed at
The New York Times at this time?
A Yes, I was.
Q And did you see this document on or

ARBITRATION
around the time it was sent?
A Yes, I did.
Q And given that you saw this
document or recall seeing this document at
or around the time it was distributed, what
did this document imply to you about the
basis on which The Times is obligated to
contribute to the Pension Fund?
A This document, the specifics of it
moved a half percent from the Welfare Fund
back to the Pension Fund, so our pension
contributions would now be changed,
effective February 1st, to 6 and a half
percent of wage effective that date.
Q And what did this document imply to
you about the Union's understanding of the
basis on which The Times is obligated to
contribute to the Pension Fund?
MR. RICHMAN: Objection.
ARBITRATOR IRVINGS: You are
asking him to speculate on their
state of mind?
MR. MILLER: Withdrawn.
ARBITRATOR IRVINGS: Okay.

ARBITRATION
Thanks.
BY MR. MILLER:
Q I'd like to draw your attention to
the use in this letter of codes.
Do you see that this letter refers
to two codes: Code 620 and Code 615.
Do you see that?
A Yes, I do.
Q Do you have an understanding of
what the reference to these codes are?
A These are codes that are used
within our payroll system.
Q So these are New York Times payroll
codes?
A Yes.
Q And the author of the letter, the
Union secretary/treasurer, is making
reference to New York Times payroll codes?
A Yes.
Q Thank you.
I now want to draw your attention
to Exhibit 7.
A Okay.
Q Do you recognize this document,

ARBITRATION
sir?
A Yes, I do.
Q And what is this document?
A This is yet another letter from the Union to Thomasina McMillan, our manager of payroll.
This time it is signed by two of my fellow trustees, the president of the Union, Doug Panattieri, and the secretary/chair, Stephen Goldstein.
And this letter, too, represents a movement of a half percent from the Welfare to the Pension.
Q And did you see this letter on or around the time it was sent?
A Yes.
Q And what did this letter imply to you about the basis on which The Times was obligated to contribute to the Pension Fund?
A Once again, it indicated to me that the Union viewed our contributions based on the percentage of wage.
Q Thank you.
Mr. Hayes, have you ever heard of

ARBITRATION
the term a "Form 5500"?
A Yes, I have.
Q And what is your understanding of a Form 5500?
A A Form 5500 is required to be filed by plans, and it lays out all the financials of a plan and all the pertinent information regarding a plan.
Q And did the NMDU Pension Fund file annual Form 5500s?
A They did file 5500s.
Q And have you reviewed Form 5500s filed by the Pension Fund?
A Yes, I have.
Q And did the information contained in those Form 5500s have an impact on your understanding regarding the proper base unit measure for the 70 percent decline test for partial withdrawal liability?
MR. RICHMAN: Can we have some understanding with respect to these documents as to when he had reviewed them?
MR. MILLER: I will get there

ARBITRATION
in due course.
MR. RICHMAN: Well, he's asking him questions about a document that I don't know if he reviewed at the time or reviewed subsequent to assessment of partial withdrawal or preparation for this proceeding.
MR. MILLER: And I'm about to indeed ask those questions. So let me do so now.
ARBITRATOR IRVINGS: Great.
BY MR. MILLER:
Q So I'd like you to turn your attention, Mr. Hayes, to Exhibit 69.
Do you recognize this document?
A This is the 5500 filing for the NMDU for Plan Year 2006.
Q And when does that 2006 plan year end?
A May 31, 2007.
Q I would like you to turn your attention to the page in this document that was marked FUND-0001759.
MR. RICHMAN: Can we get to the

ARBITRATION
point of when he looked at these? Seems to me pretty important if he is simply going to be reading something that he reviewed at a point in time subsequent to the withdrawal, preparation, subsequent to the assessment or in preparation that he --
MR. MILLER: I have my questions in a certain order, but I can reverse them to address Mr. Richman's point.
ARBITRATOR IRVINGS: So go ahead, I'd rather have you do it.
BY MR. MILLER:
Q So on or around the time of this C & S closing agreement -- strike that. I'll just lay a foundation.
At around the time of the C & S closing agreement, did you actually review any Form 5500s?
MR. RICHMAN: Objection. Leading. When?
ARBITRATOR IRVINGS: We'll get

ARBITRATION
there. We'll start with that one.
Go ahead.
A Yes, I did review some Form 5500s.
Q And what was the process by which you obtained Form 5500s to review?
A I had asked someone to supply me with the latest Form 5500s that we had and that's what I reviewed.
Q And for what purpose did you review these Form 5500s at that time?
A I wanted to see what the Fund had stated in the 5500, what the contribution rate was.
Q And do you recall looking at the Form 5500 for 2006, which is Exhibit 69, on or around the time of the C & S closing?
A I looked at several forms around that closing. This may have been one of them. I can't say if it was or not. But I did review 5500s.
Q Let's turn to the page I previously referred to which is --
A I'm sorry?
Q -- FUND-0001759.

ARBITRATION
A Yes.
Q And can you turn to the bottom of that page and the discussion of contribution rate.
A Yes. This particular page shows that the contribution rate is 6 percent of wages.
Q I'd now like to have you take a look at what's been marked -- I'm sorry -- what is Exhibit 70.
A Yes.
Q And this is also a Form 5500?
A Yes, this is Form 5500 or Plan Year 2007.
Q And can you turn your attention to the page marked FUND-0001999.
A I have it.
Q And what does that document and that page say in connection with the heading Contribution Rate?
A Contribution Rate here says, "6 and a half percent of wages effective June 1, 1999," followed by another line that says, "6.5 percent of wages effective January 1,

ARBITRATION
2008."
Q In connection with your review of Form 5500s at or around the time of the C & S closing, do you recall whether the discussion of contribution rate in those Form 5500s was put in the similar language in each one of the forms in which you reviewed?
A Yes.
Q And what was that language?
A That language was percentage of wage.
Q Thank you.
Following the closing of C & S, what, if anything, did you do to make sure that a 70 percent decline in contribution base units did not occur?
A I had requested that our Finance Department keep track of what our contribution rates were.
Q And who at the Finance Department in particular was assigned that role?
A I had asked Tom Cavallaro to keep me up to speed on what those numbers were.

ARBITRATION
Q And who is Mr. Cavallaro?
A Tom Cavallaro is vice president of Finance.
Q And would Mr. Cavallaro or others in the Finance Department report to you on this issue?
A I only had conversations about this with Tom, and I would just -- periodically he and I would discuss the Funds and we would discuss where am I on my contribution rate to the NMDU Fund, how am I doing.
Q And did you have an understanding that the Finance Department was monitoring a decline in pensionable contribution?
A Yes.
Q And what was your understanding of the basis upon which they were monitoring that decline?
A They were monitoring the percentage of wage to make sure that we didn't touch that point.
Q And indeed in connection with your communications with the Finance Department, what did his review show?

Page 162

ARBITRATION

A His review showed year by year that we were okay.

At one point, he did tell me you're within a million dollars of that point, so we had our eyes on it.

Q And what, indeed, was the time frame of these communications?

A These communications took place probably around the fund period where the Fund would report or during the September time period.

Those were kind of the benchmarks for me.

Q As a consequence of the communications with the Finance Department, were there any actions that you took or chose not to take because you did not want wages to fall any further?

A Yes. Under the closing agreement, there was a paragraph that stated that if a certain number of papers would drop below the 7, we could send more work out. And if there was enough of that occurring, we had the ability to reduce headcount associated

Page 163

ARBITRATION

with the loss of that circulation.

While there was pressure to cut costs, we made a conscious decision not to do that.

Q Not to do what?

A Not to reduce the headcount.

Q Is there anything you would have done differently had you believed that The Times was close to or about to trigger a partial withdrawal?

A Yes. The Times always has the ability to bring more work back in, so at any time I could have brought work back into The Times and hired people associated with that work.

Q During the years following the C & S closing, did The Times ever communicate with the Pension Fund with regard to the 70 percent decline and relevant base units?

A Yes.

Q I'd like to draw your attention to Exhibit 14.

Do you recognize this document?

Page 164

ARBITRATION

A Yes. This is a letter from Tony Benton, who is our senior vice president of Finance, to the NMDU Fund requesting a withdrawal liability estimate.

Q And what was the date of this request?

A The letter's dated January 22, 2009.

Q And, temporally, what was that date relative to the C & S closing?

A It was very close to the C & S closing. We closed C & S on January 4th of that year.

Q Were you involved in the preparation of this letter?

A Yes, I was.

Q And who is Mr. Anthony Benton?

A As I stated, he's our senior vice president of Finance. And at the time he was corporate controller.

Q And why did he sign the letter?

A He signed the letter after he and I discussed it, pretty much. I decided that it was better to come from him than from me

Page 165

ARBITRATION

because I am a trustee on that Fund, so it was suggested that he make the request.

Q Did The Times, to your knowledge, ever receive a response to this letter?

A No, we did not.

Q And let me draw your attention to Paragraph 4 on Page 2 of this letter.

And did The Times, to your knowledge, in particular ever receive a response to the requested information in Paragraph 4 of this letter?

A No, we did not.

Q I'd now like to draw your attention to Exhibit 56. And when doing so, Mr. Hayes and Mr. Arbitrator, please focus your attention on the second page of the letter which has a heading entitled "Mercer."

It's the second page of the document, it's a separate letter.

Mr. Hayes, do you recognize this document?

A Yes. It is a letter from Mercer to the NMDU Pension Fund.

Q And who is Mercer?

ARBITRATION

A Mercer was our outside consultant that we hired to work with us on all of our pension funds, all our multiemployer funds.

Q And can you turn to the second page of the letter. It's got the Bates stamp NYT-001964.

A Yes.

Q And you'll see there are some names at the bottom aligned with the word "copy."

Who are those individuals?

A Vince DiMaggio was vice president with us, James Dexter and Mitchell Hoffman. We were part of the Mercer firm at this time.

Q And were these the individuals that The Times had hired to consult with you on multiemployer fund issues?

A Yes.

Q And can you summarize the information requested in Paragraphs 1 and 2 of this letter?

A Once again, this is a request for withdrawal liability information.

This letter is dated 2010. We

ARBITRATION

asked for full calculations, contribution base units, just as we did before. The same requests.

Q Did The Times' consultant Mercer, to your knowledge, ever receive an estimate of withdrawal liability for the period requested in this letter?

A No, they did not.

Q Did The New York Times, to your knowledge, ever receive an estimate of withdrawal liability for the plan years requested in this letter?

A No, we did not.

Q To your knowledge, did the Pension Fund ever send any of the requested information in this letter?

A To my knowledge, they did not.

Q Did you have any conversations with others at The Times about the Fund's failure to answer both this request and the prior request that we examined a moment ago?

A Yes. We had internal discussions about the inability for us to get information that we asked for from the Fund.

ARBITRATION

Q Now, I think you testified earlier that you were recused from certain trustee meetings where issues involving The New York Times were discussed.

Do you remember that testimony?

A Yes, I do.

Q When did the meetings at which you were recused begin to occur?

A Beginning of 2009.

Q And as a consequence of these recusals, did you form a belief as to what the Fund's intentions were in connection with The Times?

A Yes. I felt that the Fund was trying to determine if it could establish a basis for a partial withdrawal.

Q Did there ever come a time in which the Pension Fund contacted The New York Times with a request for information about The Times' relationship to third-party wholesalers?

A Yes, we did get a communication from them.

Q And did you at that time form a

ARBITRATION

belief as to why the Pension Fund was seeking that information?

A I felt this was one of the thoughts they had, that they may be able to create a partial withdrawal with that claim.

Q And what was your understanding of that claim?

A My understanding of that claim is that they claimed that the companies that we had farmed the work out to were under our control and we had simply just done away with the Union members, hired in the back room somewhere these other companies and these employees were now doing the work.

Q And did you form a belief about whether that action as alleged by the Fund might give rise to or have the Fund think it gave rise to a partial withdrawal?

A I absolutely felt that that was what they were after.

Q I would like to now draw your attention to Exhibit 77.

What is this document, sir?

A This document is my letter to the

ARBITRATION

Fund, Murray Schwartz in particular, answering his request for information regarding the independent wholesalers that were now delivering the papers.

Q And take a moment and then I'd like you to briefly summarize what The Times and you indicated in this letter.

A What this letter stated to the Union and to the Fund was that these were independent wholesalers not under our control, not part of any companies that we owned, and, therefore, their thought that there was a withdrawal, partial withdrawal based on that was not true, had no basis for it.

They had requested confidential information like contracts and all of those things. And we basically said to them, there's no basis for any of that, either.

Q Now I'd like to draw your attention to Page 2 of the letter and the second paragraph of the letter.

A Yes.

Q And can you please take a moment

ARBITRATION

and review that second paragraph.

A Yes.

Q At the time of this letter, had the Fund raised any allegation of a 70 percent contribution decline?

A No, they had not.

Q Following this letter, did the Fund tell you that it was considering whether a 70 percent CBU decline had occurred?

A No, they did not.

Q Now I would like to draw your attention to Exhibit 1.

Do you recognize this document, sir?

A Yes, I do.

Q And what is this document?

A This is the Pension Fund's demand letter based on a partial withdrawal from the Fund based on the C & S closure.

Q And what is your understanding of the basis for CBUs in connection with the assertion of a partial withdrawal that is set forth in this letter?

A This letter states that it's based

ARBITRATION

on shifts.

Q And what was your reaction when you received this letter in September 2013 and learned that the Fund was asserting partial withdrawal liability on the basis of a 70 percent decline related to CBUs as shifts?

A I was very surprised by that.

Q And why was that?

A The only theory that we had seen from them was the theory of the control issue in my letter that I stated just previous. And I had requested in that letter if you have any other theory, please let us know, but if we don't hear from you, then we believe that you agree with us that it is percentage of wages.

I hadn't heard a word until this letter arrived.

MR. MILLER: No further questions at this time.

MR. RICHMAN: Take a couple minutes.

MR. MILLER: Sure.

ARBITRATION

(A brief recess was taken.)

CROSS EXAMINATION BY MR. RICHMAN:

Q Mr. Hayes, how are you today?

A I'm good. Thank you.

Q Good.

So in July 2000, you became the vice president of Labor Relations at The Times?

A When?

Q July of 2000?

A 2006.

Q 2006. My "6" looks like a zero. Okay.

And so when you became the vice president of Labor Relations in 2006 in July, did you read the collective bargaining agreement between The Times and the NMDU?

A The MOA that was in place, yes, and the contract, yes.

Q And the contract. When we talk about the contract -- let me show you Exhibit 8, so we are all talking about the same thing.

ARBITRATION
When you just answered "contract," Exhibit 8 is the contract to which you were referring?
A Yes, this is the contract.
Q Okay.
When you became a trustee of the Pension Fund, who was counsel to the Pension Fund?
A At that time, I'm not sure. I think it was Warren.
Q Warren Mangan.
A And Neal Schelberg.
ARBITRATOR IRVINGS: Warren --
MR. RICHMAN: M-A-N-G-A-N. Or some form of that.
BY MR. RICHMAN:
Q What firm is Mr. Schelberg from?
A Proskauer.
Q And Proskauer provides what to The New York Times?
A Labor counsel.
Q Labor counsel?
A Yes.
Q And Mr. Schelberg provides counsel

ARBITRATION
to The New York Times?
A No.
Q And did there come a time when Mr. Mangan ceased being the counsel to the Pension Fund?
A Yes.
Q And who took his place?
A It was taken by, I can't remember the young lady's name now, but they brought in a whole new firm at one point.
Q Does the name Elizabeth O'Leary ring a bell?
A It was before Elizabeth. Elizabeth came as part of the deal, so it was before Elizabeth.
Q So there was a deal --
A There was Jani --
Q Jani Rachelson?
A Yes.
Q So Jani Rachelson was there for a period of time?
A Yes.
Q And she's been counsel to the Pension Fund?

ARBITRATION
A That's correct.
Q And then is that when the deal was made for Elizabeth O'Leary to come in?
A Elizabeth O'Leary came in to be counsel to the Fund, and the Union trustees brought in someone else.
Q Irwin Bluestein?
A Irwin Bluestein.
Q Was Mr. Schelberg counsel to the Employer trustees?
A Yes.
Q And the other three counsel you mentioned were counsel to the Union trustees?
A Elizabeth at one point was the Union trustee, but then at one point she became sort of like tied to the director.
Q Okay.
And that director is Murray Schwartz?
A Murray Schwartz.
Q And now who was the auditor to the Fund during the time that you've been a trustee?

ARBITRATION
A I don't recall off the top of my head. I'm sorry.
Q Mitchell Lewis, does that ring a bell?
A As an auditor?
Q Yes.
A Maybe Mitch, yeah.
Q Maybe Mitch?
A I'm on a couple funds. There's names running through my head.
Q How many funds are you on?
A I'm on a couple of funds.
Q "Couple" as in two?
A Yes.
Q So you don't know whether Mr. Lewis was the auditor to the Fund?
A I believe he was.
Q But you're not sure?
A No.
Q And is he still the auditor to the Fund?
A If he was, he is.
Q If he was, he is. Okay.
During the time you've been a

Page 178

ARBITRATION
trustee, who was the actuary to the Fund?
A That would be Segal.
Q And was there a specific individual at Segal who performed the actuary services for the Fund?
A There were two representatives at Segal on the Fund.
Q And who were they?
A God. Horrible with names. One was John Urbank and then there was a young lady with him.
Q Rosana Egan?
A Rosana.
Q And which one of those was the actuary?
A I think Rosana was. I think John was just the lead guy.
Q And did both of them come to trustee meetings while you were a trustee?
A Yes.
Q And did the auditor, if it was Mr. Lewis or any other auditor, come to the meetings while you were a trustee?
A Yes.

Page 179

ARBITRATION
Q And counsel came to the meetings?
A Yes.
Q And when I'm talking about meetings, for the record it's clear we're talking about meetings of the Pension Fund?
A Yes.
Q What was the nature of your relationship, let's take counsel to the Funds?
A Just they were there at the meetings. We would ask them for legal guidance on different issues. They would give us their position.
Q Okay.
Did you have a relationship at all with Mr. Lewis?
A No.
Q Did you ever talk to him outside of the meetings?
A No.
Q How about legal counsel, have you ever talked to them outside of the meetings about Pension Fund matters?
A Yes.

Page 180

ARBITRATION
Q And with whom did you speak?
A Neal Schelberg when we had internal meetings of the management trustees on an issue.
Q Anybody else?
A Sometimes there would be counsel to the Union. It wasn't actually a meeting, but it would be a call, so, yes.
Q Okay. And what was the nature of your relationship with Mr. Urbank?
A Purely professional at the meetings. I never saw him any other place.
Q What about Ms. Egan?
A Same thing.
Q Who was the director of the Fund during the time that you were a trustee?
A Murray Schwartz for most of the time.
Q And who is the director now?
A Now it's Bob Costello.
Q And what was the nature of your relationship with Mr. Schwartz?
A He was director of the Fund. That was my relationship.

Page 181

ARBITRATION
Q Had you ever talked to him outside of Fund meetings?
A If there was an issue regarding the Fund, yes.
Q And what issue regarding the Fund did you talk to him about?
A It could be almost anything having to do with if we were looking at some type of changing someone, some money market person. If we were going to try to put the funds in some other vehicle, he might talk about that with us. But that was pretty much it.
Q You ever talked with Mr. Schwartz about how the Fund calculated withdrawal liability?
A No.
Q You ever talk with Mr. Schwartz about anything relating to withdrawal liability?
A No.
Q You ever talk to Mr. Schwartz about anything relating to partial withdrawal liability?

ARBITRATION

A No.
Q You ever talk to Mr. Schwartz about anything related to contribution base units?
A No.
Q Do you know what a contribution base unit is?
A Yes.
Q What is it?
A It's the basis on which the company makes its contribution to the Fund.
Q Okay. And is that the same or different than a contribution rate?
A It's the same.
Q It's the same. Okay.
Now, you testified something about -- on your direct about what's happening in the industry.
A Yes.
Q I want to spend a minute or two talking about that.
A Okay.
Q You are quite familiar with the industry, correct?
A I'm familiar with the industry,

ARBITRATION

yes.
Q Fortunately or unfortunately?
A Fortunately.
Q Who are the contributing employers of the Fund?
A All the -- we've got the Daily News, we've got the Post, we've got The Times, we've got the Jersey paper I can't think of right now. But, yes.
Q Okay.
And the papers are in the publishing industry, correct, all the papers you mentioned?
A Yes.
Q And what is the outlook for that industry?
A Not promising.
Q And what's because of what?
A Advertising dollars are down, subscriptions are down because of the Web. Free news. Everybody wants it for free all the time.
Q That is always a problem.
Do you have any reason to believe

ARBITRATION

that the industry will not continue to decline?
A There's no reason to believe that they would turn around.
Q Now, you indicated in your direct that at some point in time you recused yourself from certain activities as a trustee of the Pension Fund, correct?
A Yes.
Q And what did you do to recuse yourself from -- what activities did you stop doing?
A Any time there was going to be a discussion regarding The New York Times, I would recuse myself when it had to do -- and they would tell me, they would tell me, we're not going to talk about this issue and so and Neal and I knew it was time to go.
Q And why did Neal have to leave, to your understanding?
A Because it was also requested that he recuse himself.
Q Now, because of the nature of the relationship between Proskauer and The New

ARBITRATION

York Times?
A I'm not sure why the trustees felt that way, so I can't say.
Q And while you were a trustee, did you ever take a position vis–à–vis the Pension Fund that was opposite the interest of the Pension Fund?
MR. MILLER: Objection. Among other things, it's vague and ambiguous. What do you mean?
And there's no -- there's certainly no foundation to create a basis for understanding the question.
MR. RICHMAN: There is no foundation necessary. But I'll rephrase the question.
ARBITRATOR IRVINGS: Please.
MR. RICHMAN: Okay.
BY MR. RICHMAN:
Q So as I understood it, from sometime in 2009, you started to recuse yourself from certain discussions, correct?
A Yes.
Q And other than recuse yourself from

Page 186

ARBITRATION

certain discussions, did you do anything else to recuse yourself?

A I'm not sure I understand the question.

Q Okay.

Well, was the only thing that you thought you had to do in order to recuse yourself from -- let me withdraw that question.

Why did you think you had to recuse yourself?

A The trustees had asked that we do that. This came from the trustees.

Q Okay.

Did you understand why?

A Well, I certainly understood why.

Q And why was that?

A Because they were going to be discussing The New York Times.

Q Okay.

Did you ever discuss The New York Times' partial withdrawal liability with Neal Schelberg or anyone else from Proskauer?

Page 187

ARBITRATION

A No.

There was at one point someone else at Proskauer who was representing us when the theory was withdrawal based on control.

Q Okay.

And you in fact wrote a letter, did you not?

A Yes.

Q To Mr. Schwartz with respect to that issue of control?

A That's correct.

Q And you wrote that letter at the time that you were a trustee?

A Correct.

Q And you were trying to convince Mr. Schwartz that The New York Times did not have control, correct?

A No, I was not trying to convince him of anything. He had written me a letter to ask me for information directly I think as my role as the senior executive at the time.

So I answered that in that role as senior executive at the time.

Page 188

ARBITRATION

Q Now, let's take a look at the collective bargaining agreement.

First of all, let's look at the cover page. You see it says The News, The New York Times.

A Uh-huh.

Q Who is The News?

A It's just like the Daily News. I'm not sure who The News was at that time.

Q Another contributing employer to the Pension Fund?

A Yes.

Q And what was the Publishers Association of New York City?

A You know, that was before my time.

I can tell you what my understanding was, but it would not be based on any firsthand knowledge of what it was.

Q Okay. What is your understanding?

A It was a group --

MR. MILLER: Let me object. In light of Mr. Hayes' prior answer, it's going to be speculation.

ARBITRATOR IRVINGS: What's the

Page 189

ARBITRATION

purpose of this?

MR. RICHMAN: Well, I want to know a little bit about the Publishers Association. That's all I want to know. So I can drag somebody else in.

THE WITNESS: I wouldn't know.

BY MR. RICHMAN:

Q Is there anywhere in the collective bargaining agreement that requires The New York Times to contribute to the Pension Fund?

A Yes.

Q And let's see if we can take a look at Page 55 of the contract, and on the bottom it's 952, Bates number.

And I'm focused on 13-I.1.

Do you see that?

A I do.

Q When was the first time you read that language?

A First time I saw the book.

Q And when was that?

A Before I arrived here in 2006.

Page 190

ARBITRATION

Before I arrived in July 2006.

Q And when you read that and particularly the part that mentions, "The publisher agrees it shall contribute 8 percent of each employee's pay rate per shift for each shift worked by each employee in the bargaining unit" -- I'm shortening it -- "to the Pension Fund."

What did -- let's take the first phrase, "per shift."

What did that mean to you?

MR. MILLER: Objection. Lack of foundation. Obviously, the agreement was entered 25 years before he got to The New York Times, but there's been no foundation that he in fact read this particular language in 2006 and formed an opinion as to what it meant at that juncture.

MR. RICHMAN: Well, there's no other agreement that has this language, at least not according to The New York Times, because the only language that was produced by The New

Page 191

ARBITRATION

York Times was this agreement.

MR. MILLER: But you haven't established that he in fact looked at this language and formed an opinion about this language at the time he saw it.

ARBITRATOR IRVINGS: Let me short-circuit this.

I don't know how people testify as to their interpretation of an agreement. They can testify as to how it's been implemented. But just as I'm not going to have your witnesses come in and say we believe this agreement means this and he believes it means something else. So ...

MR. RICHMAN: Here's the difference here.

He has testified on direct all sorts of times about how it was clear to him that the basis of contributions was wages. And I think that if anyone had done, even the first thing that one would expect someone to do trying to figure out the basis on which a contribution was

Page 192

ARBITRATION

made might actually read the contract.

And so I can go back and ask him whether he read this language, and certainly I want to ask him what he thought this meant because I'm cross-examining him on his belief.

ARBITRATOR IRVINGS: Fair enough.

MR. MILLER: But, Mr. Arbitrator, may I be heard?

ARBITRATOR IRVINGS: You could be heard, yes.

MR. MILLER: That's another way of saying I want to know what his interpretation of the contract was.

And during my direct I asked him what the bases were for his belief that contribution base units equal shifts.

He did not in response to that direct testimony indicate that one of the bases was his reading an interpretation of the contract.

If I had and if he had given that answer, that would have opened the door

Page 193

ARBITRATION

to Mr. Richman's question.

But because he did not testify that any of the bases that formed his impression was his reading and interpretation of the contract, at this juncture to ask him what he thinks the contract means falls squarely in your admonition that you don't allow such testimony.

ARBITRATOR IRVINGS: Well, let me say this. I go back and I look at his testimony and he was asked about if he believed it was wages not shifts based on everything he had seen between the Union and The Times.

So, yes, you can go into it. However, let me say this: I don't find it probative, okay, on either side.

MR. MILLER: Thank you.

MR. RICHMAN: But let me just make one other comment because this is a different situation. This is a witness who is saying, look, I had to figure out whether we're going to

Page 194

ARBITRATION

have a partial withdrawal or not. And so I went about all these different ways to try to figure out what the partial withdrawal was. And I asked the Fund for on two occasions, they never responded.

And if he really wanted to find out whether there was a partial withdrawal, he might start with reading the contract.

ARBITRATOR IRVINGS: You can certainly ask him if he read the contract, which actually he said he did.

But the next step is to start interpreting the contract, I just -- ultimately, issues of how it was implemented, statements made, those type of things, fine. But, you know, interpretations now don't do it.

If there were statements, if there were declarations from either side, this is what we're maintaining it means, that's helpful information.

But getting a debate now from your

Page 195

ARBITRATION

respective witnesses about how they interpret the contract now doesn't do anything for me.

MR. RICHMAN: Okay. I'll just end with this. All I wanted to understand is when he came to his conclusion, how he came to the conclusion with respect to -- I mean, he said he read the contract. He said he read it at or about before the time he arrived at The New York Times.

So before he reached his conclusion, he had read the contract.

ARBITRATOR IRVINGS: Uh-huh.

MR. RICHMAN: And in reading the contract, I just wanted to know what his understanding was.

MR. MILLER: A contract that we submit was in the abstract ambiguous and you need to understand practices in order to interpret it.

I think you've indicated what weight you'll give it.

Page 196

ARBITRATION

ARBITRATOR IRVINGS: You are free to examine.

MR. RICHMAN: Okay.

BY MR. RICHMAN:

Q So did you read this language?

A Yes. As I said, back in 2006 before I showed it up.

Q And did this language ever affect your conclusion as to what the basis was for The Times contributing to the Pension Fund?

A No. As I said during my testimony, it was based on how the parties actually utilized whatever the language was, so the practice that was in place is what I based my understanding on.

Q Now, do you know or did you ever know how other employers contributing to the Pension Fund contributed?

A No.

Q Okay. So as a trustee, you never inquired into that?

A As a trustee, it never came up at any trustee meeting as to how they were doing it. I only know how we were doing it.

Page 197

ARBITRATION

Q So you never were interested in knowing how other contributing employers contributed to the Fund?

A I figured they contributed like we did. We contributed on a percentage of wages. That's how we reported, that's how we did it. I figured they did it the same way.

Q And that percentage of wages was for all wages?

A No, no, not all wages.

Q What wages?

A The contract states and the parties have identified what wages are counted, what wages are not.

Q Now let me show you the C & S contract, which is Exhibit 84.

Did you ever read this contract?

A I did read it at some point, yes.

Q And when did you read that?

A I think I read it when we started to have discussions about C & S. C & S wasn't in my purview, so I think I might have read it when I came into The Times.

ARBITRATION
And then I looked at it again, of course, when we started talking about shutting it down.
Q When we are talking about "shutting it down," you are talking about shutting down C & S?
A Yes.
Q And when was that?
A That would have been in 2008.
Q Okay.
You see this contract on the first page it says -- it extends the collective bargaining agreement which expires on March 30, 2008 until March 30, 2020.
Do you see that?
A Yes.
Q And was that, in your mind -- that's accurate, correct?
A Yes, that's what it says.
Q All right.
And if you take a look at Page 7 of the contract, and particularly language under K. This is the Roman Numeral VI, it starts on Page 4. Just so you have the

ARBITRATION
context.
And then what I'm focused on is K.
Had you seen this language during the time that there were internal discussions at The New York Times about shutting C & S down?
A We never focused on this language.
Q Never focused on this language?
A No.
Q Why not?
A We were closing C & S down, so provisions of the agreement, once it was closed, would be gone.
Q Okay. Doesn't this language indicate to you how C & S was contributing to the Pension Fund?
A How they were contributing was not important to me if I was shutting it down.
Q It wasn't important to you?
A Not when I was shutting it down.
Q Okay. Thank you.
Do you have any idea what the term in the fifth line of K "full shift contribution" means?

ARBITRATION
MR. MILLER: Objection.
Mr. Arbitrator, he's asking for an interpretation again.
MR. RICHMAN: I'll move on.
ARBITRATOR IRVINGS: And he never looked at it, so ...
MR. RICHMAN: Okay.
BY MR. RICHMAN:
Q Do you know whether the term "shift" is defined in the collective bargaining agreement?
ARBITRATOR IRVINGS: Are we talking about the --
MR. RICHMAN: I'm sorry. I'm going back and forth. Exhibit 8.
MR. MILLER: You mean the C & S agreement?
MR. RICHMAN: No. Exhibit 8 is The Times agreement.
A I don't remember off the top of my head if it is or it is not.
Q Has the language in Exhibit 8 with respect to The Times' obligation to contribute to the Pension Fund changed other

ARBITRATION
than the rates?
A I'd have to look at the MOAs to see if there have been shifts, or different work, for no work that you get paid that you get contributions for. I don't know -- I'd have to review that.
But I would have to venture to think that along the way there's been movement of what goes into that percentage of contribution, that wage.
Q Okay.
THE WITNESS: You asked me about one. Did you ask me about the contract itself?
MR. RICHMAN: Eight.
THE WITNESS: Eight. It's over here. Okay.
BY MR. RICHMAN:
Q I would like to focus you on, if you turn to Page 55 of the contract. That's in Exhibit 8.
A Yes.
Q And you see the language -- I'm really focused on the language at the

ARBITRATION

beginning of that paragraph and ending in the line that says "First day of absence ..."

Do you see that going down?

A Yes.

Q Has that language ever changed?

A I don't know. And the reason I don't know, the literal reading says "for each shift worked," but I'm pretty sure we made contributions for shifts that are not worked.

Q Okay.

A So when you ask me if it's changed, I can tell you that the practice doesn't follow what you see, so that's why you look to the practice of the parties to understand how it's administered.

Q Okay.

And for what types of contributions -- contributions are due on behalf of employees who haven't worked, correct, under certain circumstances; is that right?

MR. MILLER: Objection. Are

ARBITRATION

you asking him the practice as he understands it or, again, an interpretation of the contract?

MR. RICHMAN: I'm asking for him as his practice.

ARBITRATOR IRVINGS: Go ahead.

A Yes.

Q Okay. And what kind of -- give me an example of one.

A When an employee is on vacation.

Q Okay. And what was the practice of The Times when an employee was on vacation?

A I believe we gave him a percentage of wage.

Q Okay. And how did you figure out what that wage was?

A We knew what his wage was, and we paid him that percentage of that wage for that day.

Q For that day?

A For that day.

Q And is it correct that a day is a shift?

A He didn't work.

ARBITRATION

Q I understand he didn't work the shift, but is it correct that a day is a shift?

MR. MILLER: Can you answer that?

A A day, if you want to make that leap, yes, a day is a shift. Could be a night shift.

Q Could be a night shift. That's right?

A Could be night, could be day.

Q It could be a night shift and could be a day shift?

A Right.

Q How does The Times contribute for employees who go on Workers' Compensation?

A I'm not that familiar with the ins and outs of that.

Q Okay. But you don't know?

A No.

Q I think we're looking at 116, so we need a new volume.

Have you had a chance to read it?

A Yes.

ARBITRATION

Q Did you work with Mr. Baker?

A Yes, I did.

Q So when you came to The Times in 2006, he was still there?

A Yes.

Q And did he report to you?

A Yes.

Q Did he generally know what he was doing in his job?

MR. MILLER: Objection.

What do you mean by that question?

A He was my employee. I would not like to talk about what I felt about his work.

Q Okay.

A I'm not sure if it's relevant to what we're talking about.

Q Okay.

So when you read this, this is a letter that he sent to Mr. Schwartz.

And in the letter he says, "This is to confirm that the two New York Times checks" -- and the checks, by the way, are attached.

ARBITRATION

Do you see them on the second and third page?

A Okay.

Q -- "in your possession are contributions for 23 shifts to the Welfare Fund and for 23 shifts to the Pension Fund" -- you see that -- "on behalf of Mr. Santiago Aguilar."

MR. MILLER: Mr. Arbitrator, I'm going to object to this line of questioning on complete lack of foundation.

Mr. Hayes was not at The Times in 2001. Mr. Richman has not established he's seen this letter.

Mr. Richman has not established a foundation that Mr. Hayes, unlike Mr. Claffee, is familiar with the payroll processes at The New York Times.

MR. RICHMAN: All I'm going to ask him is if what is described here comports with what his understanding is of The New York Times' practices, if he has one.

ARBITRATION

MR. MILLER: And my objection is that Mr. Richman has not even laid a foundation that Mr. Hayes understands and is knowledgeable about the payroll practices.

We had testimony about the payroll practices from somebody who is knowledgeable.

MR. RICHMAN: He knows what --

ARBITRATOR IRVINGS: You got the answers you wanted from the witness who knew about payroll practice.

You want to keep asking?

MR. RICHMAN: I'm going. I'm going. Sorry.

BY MR. RICHMAN:

Q Now, Mr. Hayes, let me show you Exhibit 42.

A Okay.

Q Have you ever seen these before?

A I've seen this at some point.

Q Can you tell us at what point?

A Oh, within the last couple weeks.

ARBITRATION

Q Oh, okay. I'm not interested at that point.

Okay. Prior to the Fund assessing partial withdrawal liability against The Times, had you seen these?

A No.

Q Okay. Now, you indicated on direct that you reviewed Form 5500s, correct?

A Yes.

Q And you indicated on direct that you received them from -- I wrote down "someone."

A Yes.

Q Can you tell me who the someone is?

A I don't recall. It might have been from our actuary consultant. I'm just not sure.

Q That actuary consultant would have been Mercer?

A Yes.

Q And let's take a look at Exhibit 69, please.

A All right.

Q Now, my understanding of what you

ARBITRATION

testified on direct was that you read the Form 5500.

A I read some 5500s. I've read a lot of 5500s since I've gotten the letter.

Q Okay.

And, but it is my understanding that you looked at Form 5500s during the time period that you were working on closing down C & S.

A Yes.

Q I'm sorry. You have to wait until I've finished, even though you were right on the question.

So, but you didn't recall exactly which 5500s you read, correct?

A That's correct.

Q So we're going to take them one by one.

And so this one is for the plan year ending 5-31-2007.

And I want to direct your attention to Page 1793, particularly if you just read the paragraph to yourself entitled Contributions.

ARBITRATION

A Okay.

Q Now, did you read that when you read the Form 5500?

A No, I did not.

Q So did you read the audit report -- this is part of an audit report.

If we go back to Page 1785, you can see the front page of that.

A Yes.

Q Did you read the audit report at the time that you read the 5500s?

A As I said, I wasn't sure if this was one of the 5500s I reviewed.

Q Okay.

But there were audit reports that you did review.

A No. I was focused -- when I looked at the 5500s, I was focused in one place and I was looking at the contribution rate.

When I went to the Form 5500, I wanted to see how the Fund stated that.

So that's where my focus was.

Q Why was that your focus?

A Because that's the form that the

ARBITRATION

plan states for the world to see and understand how it operates, and it gives you all of its elements there.

So that's why I went straight there.

Q And as I recall your testimony before, to you, contribution rate is the same thing as contribution base unit?

A Yes.

MR. RICHMAN: I don't need to go through these one by one.

BY MR. RICHMAN:

Q Is it your testimony, Mr. Hayes, you never read an audit report from the Pension Fund?

A I never said that.

MR. MILLER: Wait. Objection.

MR. RICHMAN: I'm asking. It's his testimony.

Q Is it your testimony that you have never read an audit report from the Pension Fund?

MR. MILLER: No. Objection. I think the implication -- I don't know

ARBITRATION

whether you're asking him whether he read audit reports during that 2008/2009 time frame or more broadly.

MR. RICHMAN: I'm starting more broadly and then I'll focus.

MR. MILLER: Okay.

A I have read audit reports, yes.

Q For the Pension Fund?

A Yes.

Q And when was the first time that you read an audit report from the Pension Fund?

A I can't recall.

Q Did you read them during the time period that you were working on shutting down C & S?

MR. MILLER: I think he already testified --

MR. RICHMAN: Excuse me.

Q Did you read them --

A I can't recall when I read them.

Q Okay. And so is it your testimony that you can't place any time period when you read an audit report for the Pension

ARBITRATION

Fund?

A No.

Q It's not your testimony?

A No, I can't tell you when I did or did not read it.

Q So you don't know whether you read it before the Pension Fund assessed partial withdrawal liability against The Times?

A I don't know if I did or not, no.

Q Okay.

When you were working on this project with respect to shutting down C & S, who else at The New York Times was working with you?

A There was a very large group of us working on that project. It included people from Finance, it included people from Circulation. It included a lot of folks. There was a room larger than this full of people.

Q The room had more people or it was a large room?

A Both.

Q Sorry. Couldn't help it.

ARBITRATION

Did you ask any ERISA counsel to review the Form 5500s of the Pension Fund at or around the time that you were working on the closing of C & S?

MR. MILLER: Mr. Arbitrator, I think this runs quite close to a question that's covered by the attorney/client privilege.

I think that the answer as to whether legal advice was sought is probably okay, but I want to put the marker down now that Mr. Richman can go no further.

ARBITRATOR IRVINGS: The marker is glowing.

MR. RICHMAN: I would never cross the marker.

ARBITRATOR IRVINGS: Go ahead.

MR. RICHMAN: I'll assure you.

BY MR. RICHMAN:

Q Can you answer that question, please.

A Yes.

Q You did?

ARBITRATION

A Yes.

Q And who was that counsel?

A It was Mr. Projansky.

Q At Proskauer Rose?

A Yes.

Q Did you ask The Times CFO to review the Pension Fund's audit reports during the time that you were working on shutting down C & S?

A No.

Q Now, were you present at a board of trustees meeting of the Pension Fund when there was a discussion of a payroll audit of C & S?

A I was there when they said that an audit of C & S had been ordered, yes.

We usually were told when they were going to audit and who they were going to audit. So, yes, I was there.

Q Okay. Let me show you Exhibit 51 first.

A Okay.

Q Now, these are minutes of a trustees meeting, correct?

ARBITRATION

A Yes.

Q And you were present at that trustees meeting?

A Yes, I was.

Q Were you present at the meeting during the time that Mitchell Lewis gave his report?

A Yes.

Q And did you listen to Mr. Lewis' report?

A Yes.

Q Did you ask him any questions?

A No.

Q Did you talk to him outside of a trustees meeting about his report?

A No.

Q Did you ever talk to Murray Schwartz about Mr. Lewis' report?

A No.

Q Talk to any of the other trustees about Mr. Lewis' report?

A No.

Q Did you ever talk to anybody else -- and "else" meaning other than the

ARBITRATION

people I just's went through with you -- about Mr. Lewis' report?

A No.

Q I'm going to show you -- well, let's turn to Page 12 -- let's start with Page 1246. The Bates numbers on the bottom.

A 1246, yes.

Q This was handed out at the meeting, correct?

A Yes. I think it was an attachment.

Q Okay. And when you go to a trustees meeting, are there documents provided to you?

A Yes.

Q And when are those documents provided to you?

A At the beginning of the meeting.

Q And do you read those documents?

A No. We don't go through them at the meeting.

Q Okay. I'm sorry. Fair enough answer.

Do you personally take the time to read those documents?

Page 218

ARBITRATION
A Not all of them.
Q And do you provide those documents to anybody else at The Times to read?
A No. In fact, they never leave my office.
Q Okay. If you look at Page 1247.
A Yes.
Q First, did you read this report? And "this report" meaning the April 20, 2010 letter from Mitchell Lewis and Ivy -- I can't see the last name -- to Murray Schwartz.
A Yes, I think I may have looked at this one.
Q And when you say you think you may have looked at it, would that have been at the time that it was handed out at the trustees meeting?
A Or sometime after, probably. Not at the meeting itself.
Q All right. And were you concerned that anything in this report was inaccurate?
MR. MILLER: Objection. Lacks foundation.

Page 219

ARBITRATION
MR. RICHMAN: He said he read it. I want to know if --
Q Is there anything in this report that you looked at, that you read, whether it was inaccurate?
MR. MILLER: But, again, objection. He hasn't laid a foundation that Mr. Hayes is aware of the issues and has direct knowledge of the issues in payroll practices that are addressed in the document.
MR. RICHMAN: All I did was ask him, were you concerned.
ARBITRATOR IRVINGS: Yeah. I mean, he can answer -- he's not going to be able to answer whether in fact they were accurate, but whether he had a concern about whether they were accurate.
A I did review the document. I don't know if it's accurate, I can't say, but I did review it.
Q No. What I'm asking you is, when you reviewed the document, were you

Page 220

ARBITRATION
concerned that the document was not accurate? The things in the document were not the accurate?
MR. MILLER: Same objection.
ARBITRATOR IRVINGS: This is about his state of mind then.
Go ahead.
A No, I didn't look at it for accuracy.
Q What did you look at it for?
A I was looking at it for how the Fund treated pension and it was percentage of wages. And it moved around the diversion, just like they had in the letters that we've written. So it was consistent.
Q Okay.
Let me show you Exhibit 45.
A Okay.
Q Just flip through there. Take your time.
A Okay.
Q You attended this meeting?
A Yes.
Q And you see on Page 1250, which is

Page 221

ARBITRATION
the second page, it says Mr. Lewis reviewed the final results of C & S payroll audit.
You see that?
A Yes.
Q And were you in the room when that review occurred?
A I was in the room, but the reviews of Mr. Lewis' reports are not very in depth.
Q Okay. And so what was the review in this case that you remember?
A They just told us what the amount was and that it was paid, and that was it.
Q Okay. Now, the letter that's attached, that's at 1251.
A Yes.
Q June 14, 2010 letter from Mitchell Lewis and Ivy Narissi to Murray Schwartz.
Do you see that?
A Yes.
Q Okay. And did you review this at the meeting?
A No, I didn't review it at the meeting.
Q Did you review it after the

Page 222

ARBITRATION

meeting?

A I don't know if I looked at this because it was only the followup to what we had obtained in April.

Q But this was in fact the result of the audit, was it not?

A Yes.

Q And it showed The New York Times owed the Pension Fund money, correct?

A Right.

Q And The New York Times paid that money, correct?

A Right.

Q Did The New York Times protest before paying that money?

A You know, I don't get involved in the audits, so I'm not really sure what the back and forth may have been.

Q Who would have been involved in the audits?

A Our Payroll folks are involved in the audits. Sometimes my folks get involved in the audits.

Q Okay. At this time -- and we're

Page 223

ARBITRATION

talking about June of 2010 -- do you know who got involved in this audit?

A No, I don't. Not offhand. I'm sure our Payroll folks were involved, but ...

Q When you say "our Payroll folks," to whom are you referring?

A People who work in Payroll.

Q I was actually looking for some names.

A I can't tell you who. I don't know. I would imagine -- I don't know. I don't know.

Q Would these people be down in Virginia or --

A Yes, they would be down in Virginia. Morris would probably be involved, Morris Claffee. I think you met him earlier.

Q Yes, I did meet him. Twice, in fact.

A Yes, he would probably be one of those folks.

Q During the discussions that you had

Page 224

ARBITRATION

internally at The New York Times concerning the closing of C & S, it's my understanding from your direct testimony that you -- by that I mean you or somebody else in The New York Times -- ran some models with respect to partial withdrawal liability.

A Yes.

Q And do you know if those models still exist?

A I don't know. Probably not.

Q Who ran those models?

A Can you be more precise on which model you are talking about?

Q Well, actually, you just talked about models, so I'm going to flip the question on you.

What kind of models were run?

A I mean --

Q With respect to partial withdrawal liability.

A Well, I mean, it was based on the fact that we couldn't get real good information. We kind of looked at the last information we had to figure out what our

Page 225

ARBITRATION

percentage of the liability was, the shortfall and the funding of the Fund.

And so we kind of did, if you will, a back-of-the-envelope to figure out what that withdrawal might be, what that partial might be based on those numbers, because we couldn't get any real good numbers to work with.

Q Okay. And you couldn't get any good numbers because why?

A Didn't have them.

Q Okay. And who worked on this model --

A I wouldn't call it a model. I wouldn't call it a model. It wasn't a whole lot of, you know, click one button, a whole lot things move. It wasn't that situation.

Q Well, you were the one in your direct testimony called it a model, right?

A Yeah.

Q So let's just stick with that. It may not have been a sophisticated model.

A Yes.

Q But it did model what would trigger

ARBITRATION

a partial withdrawal, did it not?

A Yes. Well -- and I have to say, remember, when we closed C & S, it was our interpretation that we were taking no one. So we expected there to be a partial because we weren't taking any of the employees.

Q Okay.

Well, first, we haven't gotten to the point to answer my question about who worked on this model?

A It was me and my attorney. My labor attorney.

Q And who is your labor attorney?

A Bernie Plum.

Q And Bernie Plum is from Proskauer, correct?

A Yes.

Q And so were you running the model or was he running the model?

A I was running the model.

Q And what were the inputs into the model?

A Like I said, we looked at what our shortfall, what the total shortfall in the

ARBITRATION

plan was. We looked at our size within that plan, and that's how we kind of came up with some numbers.

Q Did a benefit consultant work on that model?

A No.

Q No?

A No. Not at that point.

Q And did the model indicate how many employees The New York Times needed to transfer over to -- I'm sorry.

Let me withdraw that.

Did the model indicate how many employees The New York Times needed to hire from C & S in order not to have a partial withdrawal?

A No, not when we initially did it. We kind of did the back-of-the-envelope knowing what the total pay of a New York Times driver is, and we just multiplied numbers.

Q Well, multiplied what numbers?

A Multiplied the number of people that you hire to what The New York Times

ARBITRATION

wage rates were.

Q Okay.

A Okay. And then we looked at how much of that, a percent of that is what you would give to the Fund.

So it was just plugging in the numbers and watching the numbers fly.

Q Now, you indicated it was a coincidence --

A Yes.

Q -- that the number of people you were willing to hire happened to not cause a partial withdrawal; is that correct?

A That's correct.

Q And what was -- withdrawn.

How far above the contribution were you with the 58 or 60 employees that you were going to hire -- I'm sorry. Withdraw that.

So you were talking about hiring 58 or 60 employee from C & S.

A Right. Associated with the work that we were going to leave inside The Times.

ARBITRATION

Q And so that was -- the decision, was that driven by the work that The New York Times decided to take inside The Times?

A Yes. As I said, the Union's real point was to try to get The Times to take some of the former C & S employees.

So we identified a business decision that made sense for us to leave inside. So once we figured out what we were going to keep inside The Times -- and that number moved around a little bit as we came up to the less than seven or eight or more -- we determined how many people we needed to do that work.

Q Okay.

Did the C & S contract require you to keep certain people on payroll from C & S for a period of time?

A On C & S?

Q Or C & S or New York Times?

A No.

Q No?

A No. There was no requirement to keep people in a closed company, no.

Page 230

ARBITRATION
Q Was there a requirement to transfer them to The New York Times?
A There was -- I think the Union asserted at some point there was some obligation, but we disagreed with that.
Q Now, during this period of time had you asked the Fund for a withdrawal liability calculation?
A During which period?
Q During the period that you were running these models, running the model or models trying to figure out what the potential partial withdrawal might be.
A I don't recall when we were in the midst of that doing that.
I do recall shortly thereafter doing that.
Q Okay.
Because -- when was the first time that The New York Times asked for a withdrawal liability estimate from the Pension Fund?
A I can't tell you when they first asked. I can tell you when I became aware

Page 231

ARBITRATION
of the first request.
Q Okay. When were you first aware of the first request?
A That was the January 22nd letter.
Q Of what year?
A 2009.
Q And that's after an agreement was already reached concerning the closing down of C & S?
A Yes.
Q And you learned, as I understand from your direct testimony, that the Pension Fund did not provide the information to the first request -- that you at least were aware of -- The New York Times made for withdrawal liability.
A That's correct.
Q How long after the first request was second request made?
A To my knowledge, it was about a year.
Q About a year. And why did you wait a year to ask again?
A We were probably going through the

Page 232

ARBITRATION
same process that we usually go through. We were reviewing our funds. And we realized we didn't get an answer from The Times -- from the NMDU. I'm sorry.
Q When you didn't get an answer from the Pension Fund, you were unhappy about it, correct?
A I was disturbed why we didn't get an answer.
Q I'll use "disturbed."
And so what did you do to attempt to get an answer from the Pension Fund?
A I didn't do anything from my position to get an answer.
Q Did you ask anybody to contact the Pension Fund and attempt to get an answer to your request?
A I did not personally do that, no.
Q Did anybody else?
A I'm unaware if they did.
Q And did you ever ask Murray Schwartz, How come I can't get a response to my request for a withdrawal liability estimate?

Page 233

ARBITRATION
A No, I didn't.
Q Did you ever ask Neal Schelberg the same question?
A No, I didn't.
Q Did you ever ask Rosana Egan or John Urbank the same question?
A No. Like I said, I don't talk with them except when they're giving reports.
Q Did you ever raise the issue at a trustees meetings as to why can't I get a response to my request for withdrawal liability estimate?
A No, I did not.
Q Did you ever ask the Union as to why you didn't get a response to your request for withdrawal liability estimate?
A No.
Q How come?
How come you didn't ask anybody?
A I had done what the Fund requires and that's to make the request. So we gave them written requests for the information.
Under the plan, I'm supposed to get it.

ARBITRATION
Q And when you didn't get it, you didn't follow up?
A No. I asked again the following year.
Q And then you didn't get that?
I'm sorry, there's got to be a audible response.
A You're correct. I didn't get it.
Q And when that happened the second time, you didn't follow up?
A No, I didn't.
Mr. Schwartz followed up with me with a question regarding information on a theories on withdrawal liability. That was the answer I got from the Fund.
Q Well, that answer wasn't an estimate of withdrawal liability, was it?
A Exactly, it was not.
Q You said Mr. Cavallaro, he's a VP of Finance at The Times?
A Yes.
Q Now, he was following the situation for you to see if you were coming close to triggering a partial withdrawal, correct?

ARBITRATION
A Yes.
Q And if he came to you and said we have a problem -- I'm sorry. I withdraw.
Did he ever come to you and say, look, we have a problem here and we're going to trigger a partial withdrawal?
A No.
Q But if he came to you and said we have a problem, we're going to trigger a partial withdrawal, what would you have done?
A I could have brought more work back in-house.
Q And that would be for the purpose of avoiding a partial withdrawal?
A Yes.
MR. RICHMAN: I just want to take a few minutes.
(A brief recess was taken.)
MR. RICHMAN: Okay. We're done.
MR. MILLER: Oh, okay.
We can go back on the record.

ARBITRATION
REDIRECT EXAMINATION BY MR. MILLER:
Q Mr. Hayes, I just have a couple of follow-up questions.
You were asked several questions about The New York Times' payroll system.
How knowledgeable are you about The New York Times' payroll system?
A Not at all.
Q How knowledgeable are you about the process that the Times uses to calculate and pay pension contributions to the NMDU Pension Fund?
A I don't get involved in those calculations.
Q Now I'm going to ask you a couple questions about your role as a trustee.
As a trustee, do you see remittance reports that are filed by other contributing employers?
A No, I do not.
Q How involved are the trustees in the day-to-day collection of contributions at the Fund?
A We don't ever see any documents on

ARBITRATION
who is making what contribution and how they're making it. We never see those.
Q You were asked several questions about following up with the Pension Fund in connection with The New York Times' request for withdrawal liability estimates and other information.
Let me ask you this question:
Do you have a belief whether it would have been appropriate for you in your trustee role to use that trustee role to get the Fund to respond to pending requests for information made by The Times?
A No. As I said, I was recused from that. And for me, that was an extension of that recusal is that I didn't think that was appropriate for me to do that.
Q And is that why you did not followup with individuals at the Fund in connection with The Times' request for information?
A Yes.
Q And finally, Mr. Hayes, I want to draw your attention to Exhibit 45 which we

ARBITRATION
previously looked at. Those were redacted minutes in connection with that Weiser report.
A The September 24th --
Q It's the September 24th minutes. And attached to that is a letter from Weiser dated June 14, 2010.
A Yes.
Q You are there?
A Yes.
Q I want to draw your attention to Page 2 of that letter, and at the top of Page 2 of the letter, there's a paragraph entitled "Result."
And I'd like you to just read that paragraph to yourself for a moment.
A Yes.
Q The last sentence in that paragraph discusses recalculation of pension contributions.
A Yes.
Q And do you have a belief as to whether the statement in that last sentence about how to calculate pension contributions

ARBITRATION
is consistent with your understanding of the contribution form?
A The way it's written, it is consistent with my understanding.
Q Okay.
MR. MILLER: No further questions.
RECROSS EXAMINATION BY MR. RICHMAN:
Q So, Mr. Hayes, you thought as part of your recusal that you couldn't follow up with anyone at the Fund with respect to The New York Times' requests for a withdrawal liability estimate; is that correct?
A I thought it would be inappropriate for me to do that.
Q Okay. So you thought it would be inappropriate to do that.
But let's turn to Exhibit 77.
A Yes.
Q And you did send this letter, correct?
A Yes, I did.
Q Okay.

ARBITRATION
Did you write the letter?
A Yes, I did, with some help from my counsel.
Q And you actually didn't come up with the sections of ERISA, did you, that's referenced in the letter?
A No.
Q And so you thought it was appropriate for you to send this letter to the Fund in response to Mr. Schwartz's request to you but it was inappropriate for you to ask for an estimate of The New York Times' withdrawal liability?
A Mr. Schwartz asked me a question in a letter in my role as a senior manager at the time, and so I felt appropriate as a senior manager of The Times to answer that letter.
And so that was different than in my role as a trustee to try and use that role to try to get the Fund to do something that it clearly didn't want to do and that's answer what we've asked them for.
So I felt uncomfortable doing that

ARBITRATION
for the reasons we were asking.
MR. RICHMAN: I have no further questions.
MR. MILLER: No further questions.
ARBITRATOR IRVINGS: Very good. Thank you very much.
Off the record.

(Whereupon, the proceeds were adjourned at 5:18 p.m.)

ARBITRATION

I N D E X

E X H I B I T S

ARBITRATION

C E R T I F I C A T E

STATE OF NEW YORK)
: ss.
COUNTY OF NEW YORK)

I, BARBARA R. ZELTMAN, Shorthand Reporter and Notary Public, within and for the State of New York, do hereby certify:

That this transcript is a true record of the proceedings had.

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 17th day of February, 2015.

BARBARA R. ZELTMAN
Court Reporter and Notary Public

ARBITRATION - VOLUME II

AMERICAN ARBITRATION ASSOCIATION

---------------------------------------X

THE NEW YORK TIMES COMPANY,

Petitioner,

v.

NEWSPAPER and MAIL DELIVERERS'-PUBLISHERS' PENSION FUND,

Claimant.

---------------------------------------X

ARBITRATION

VOLUME II - DAY 2

New York, New York

Wednesday, February 11, 2015

REPORTED BY: BARBARA R. ZELTMAN

Professional Stenographic Reporter

Job Number: 90058

ARBITRATION - VOLUME II

February 11, 2015
9:11 a.m.

Arbitration proceedings held at American Arbitration Association, 120 Broadway, New York, New York, before BARBARA R. ZELTMAN, a Professional Stenographic Reporter and Notary Public within and for the State of New York.

ARBITRATION - VOLUME II

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ARBITRATION - VOLUME II

ARBITRATOR IRVINGS: Let's get started.

DARREN FRENCH,
having been first duly sworn by Arbitrator Irvings, was examined and testified as follows:

DIRECT EXAMINATION BY MR. MILLER:

Q Mr. French, can you state for the record your full name and the town and state in which you reside.
A My name is Darren French. I reside in Edgewater, New Jersey.
Q Good morning, Mr. French.
A Good morning.
Q What is your profession, sir?
A I'm an actuarial consultant to multiemployer pension funds and to certain contributing employers to the same.
Q Are you familiar with the term "enrolled actuary"?
A Yes, I am.
Q And what is your understanding of the term "enrolled actuary"?
A It's a person who is authorized to

ARBITRATION - VOLUME II

sign certain government filings, certain schedules, the Form 5500, for example.
Q And are you an enrolled actuary?
A Yes, I am.
Q And how does one become an enrolled actuary?
A There are several exams one needs to take. There are some experience requirements, working in funds or other experience as actuaries, and application.
Q And I take it you took and passed the exams to become an enrolled actuary?
A Yes, I did.
Q Can you please summarize for us your general qualifications as an actuary?
A I spent about 30 years as an actuarial consultant with Buck Consultants working on all kinds of pension plans but in particular multiemployer plans for the last 20 years or so.
Q And when did you leave the employment of Buck?
A Around the end of 2013.
Q And under what circumstances did

ARBITRATION - VOLUME II

you leave Buck?
A I retired.
Q And do you continue to engage in actuarial consulting for either pension funds or employers?
A I continue to do some actuarial consulting, some special assignments for both funds and employers.
Q And by "funds," do you mean multiemployer funds?
A Yes, I do. Excuse me.
Q Are you a member of any professional societies?
A Yes. I am an associate of the Society of Actuaries and I'm a member of the American Academy of Actuaries.
Q And how does one go about joining these actuarial societies?
A Well, the Society of Actuaries is a series of exams as well as application and application fee, and the Academy of Actuaries is really a related type of qualifications and, again, application and fee.

ARBITRATION - VOLUME II

Q Thank you.
Did you serve during the course of your career in any leadership role in any of these professional societies?
A Yes. I was -- from around 2008 through 2014, I think, I was a member of the Multiemployer Task Force of the American Academy of Actuaries.
Q And can you briefly summarize for the record what kinds of activities the Multiemployer Task Force of the triple AAA engage in?
A Periodic calls and meetings to discuss potential legislation, to discuss our input on any guidelines that are going to be put out by the triple AAA, as well as meetings sometimes with PBGC or IRS to help them understand the law and the implications of any changes thereof.
Q And during the course of your association with this task force, did you in fact represent the triple AAA in connection with meetings with regulatory agencies?
A Yes, I did.

ARBITRATION - VOLUME II

Q Do you have experience with multiemployer pension funds?
A Yes, I do.
Q And can you briefly summarize for the record that experience.
A Yeah. Over the last 20-something years, I have probably worked on maybe 15 or so plans that I was the enrolled actuary. Maybe 10 to 15 plans I was working on.
I had done and reviewed withdrawal liability calculations probably in the hundreds as well as done audits or reviews for employers on at least a hundred other calculations done by other actuaries at, I'm going to say, maybe 50 funds.
Q During the course of your work at Buck, did you have any leadership role at Buck Consultants?
A Yes. From around 2008 till when I retired, I basically led Buck's multiemployer practice.
Q Can you please summarize for the record what that leadership role entailed?
A It entailed marketing, it entailed

ARBITRATION - VOLUME II

helping set standards for the firm, helped review reports and memos that other actuaries who maybe had less experience in multiemployer plans did, and, of course, handling my own caseload of multiemployer clients.
Q Thank you.
And what are the responsibilities of the enrolled actuary for a multiemployer fund?
A Well, the enrolled actuary essentially signs reports and the government filings and really, ultimately, has -- is where the buck stops and has the ultimate decision-making authority over the actuarial assumptions.
Q Must those assumptions that an actuary makes in connection with his or her work for a multiemployer plan be certified by that actuary as representing their best estimate of those assumptions?
MR. RICHMAN: Objection. We're past the introductory stage. Let's stop leading.

Page 253

ARBITRATION - VOLUME II

ARBITRATOR IRVINGS: Okay.

MR. MILLER: Okay.

BY MR. MILLER:

Q What, if any, attestations does an enrolled actuary have to make in connection with the actuarial assumptions that such actuary determines for a multiemployer fund?

A Well, I could think of at least two things: One is there's a certification requirement on the Schedule MB. Schedule MB, for example, to the Form 5500 where such an attestation is needed.

And under the Academy rules, any valuation reports and any communications that involve valuations need to have such certification.

Q In connection with your work at Buck, did you ever engage in peer review work of your multiemployer fund enrolled actuary colleagues?

A Yes, I did.

Q And can you briefly summarize that work.

A Yes. You know, memos and reports

Page 254

ARBITRATION - VOLUME II

other actuaries did, either peers or other actuaries with less experience, just to review and make sure, you know, the basic rules are met and that there's nothing else that I could suggest that would be helpful.

Q And although you may have previously touched upon this, do you have experience with respect to withdrawal liability under ERISA?

A Yes, I do.

Q And can you please summarize that experience.

A Yes. I've done, again, probably hundreds or at least supervised hundreds of calculations of withdrawal liability, and probably at least a hundred that I have reviewed that other actuaries have done on, again, I would say 50 funds.

Q What are some of the multiemployer funds for which you have served as the enrolled actuary?

A The Teamsters Central States Fund. The UNITE HERE National Retirement Fund would be another. The IUE-CWA Pension Fund,

Page 255

ARBITRATION - VOLUME II

third.

Q And can you please summarize for the Arbitrator the size of the Central States Teamsters Pension Fund vis–à–vis other multiemployers.

A The Central States Teamsters Pension Fund I believe -- certainly is one of the biggest funds in the country. And my understanding is it's the largest in terms of numbers of participants.

Q And what are some of the other large multiemployer funds that you have worked with?

A I've worked on the Western Conference of Teamsters Pension Fund, Blacksmiths-Boilermakers Pension Fund.

Q Can you please summarize for the Arbitrator the size of the Western Conference of Teamsters pensions?

A The Western Conference of Teamsters Pension Fund, again, one of the largest multiemployer pension funds in the country and I believe the largest in terms of assets.

Page 256

ARBITRATION - VOLUME II

Q Have you previously testified in any litigation as an expert witness on actuarial issues?

A Yes, I have.

Q And what is the most recent case in which you've served as an expert witness?

A It was -- I believe it was the FELRA Pension Plan versus the Great Atlantic & Pacific Tea Company. It was done in the Southern District Court in White Plains, New York.

Q And what year was that, sir?

A 2013.

Q And did you testify as an expert during the trial in that case?

A Yes, I did.

Q And were you qualified as an expert by the judge in that case?

A Yes.

Q Have you previously testified in any arbitrations as an expert witness on actuarial issues?

A Yes.

Q And can you please summarize the

ARBITRATION - VOLUME II

number of arbitrations in which you've testified as an expert?

A Three or four. Something like that.

Q And in those arbitrations, were you qualified by the arbitrator as an expert on actuarial issues?

A Yes.

Q Has any adjudicator ever rejected you as an expert either in litigation or arbitration in connection with actuarial issues?

A No, not to my knowledge.

MR. MILLER: Mr. Arbitrator, at this juncture, I'd like to move to qualify Mr. French as an expert on actuarial issues.

MR. RICHMAN: I didn't know this was an issue.

MR. MILLER: Okay. Good? Thank you.

ARBITRATOR IRVINGS: Go right ahead.

BY MR. MILLER:

ARBITRATION - VOLUME II

Q Have you been retained by The New York Times as an expert actuary in this case?

A Yes, I have.

Q In general terms, can you describe what you were asked to do by The Times?

A Yes. I was asked to review the withdrawal liability assessment that was assessed against The New York Times and provide my professional opinion, actuarial opinion on the assumptions used and, in particular, the assumption regarding the interest rate that the Fund employed.

Q And what do you mean by the "interest rate" assumption?

A By the "interest rate," I mean the rate at which the benefit obligations were discounted in order to determine the present value of the liabilities.

Q And can you please summarize what you reviewed in order to carry out that assignment?

A Well, I reviewed the calculation, of course, as well as the back-and-forth

ARBITRATION - VOLUME II

letters between the Fund and Fund counsel.

There was four or five valuation reports, 2007 or '8 through 2013 or so. And similar dates for the Fund audited financial statements.

And I also reviewed the appropriate sections of the law and the actuarial standards.

Q Thank you.

In general, what do you understand to be the purpose of withdrawal liability?

A Conceptually, withdrawal liability as I understand it is that when an employer withdraws from a multiemployer plan that they basically pay their fair share of the unfunded vested benefit obligations.

Q And can you explain what you mean by "unfunded vested benefit obligations"?

A Yes.

The fund has certain legal obligations that have been accrued and invested under the plan and there's a pool of assets. And to the extent that those obligations or liabilities exceed the

ARBITRATION - VOLUME II

assets, that's an unfunded benefit vest -- vested benefit obligation.

Q Without getting into too much technical detail, how does an actuary go about measuring those unfunded vested benefits?

A The fund basically has a series of payments that it needs to make. And those payments, in simplistic terms, are brought back to today's value via the discount rate. You look at the payment, five years, ten years, each of the payments. Each of those are brought back in terms of present value to today. That is compared to the current value of the assets, and the difference is the unfunded benefits.

Q Can you elaborate a little on what it means to discount a future pension payment obligation to its present value?

A Well, yeah, because of the time value of money, say $100 payable ten years from now is not worth $100 today. And the same way that $100 today is going to be worth more than that in ten years because

ARBITRATION - VOLUME II

there's interest and investment earnings on that money.

Q So what then is the relationship between a discount rate and the interest earned or interest rate on assets?

A My view, they're basically the same thing, almost to say two sides of the same coin.

The interest rate is kind of the way you take a dollar today and bring it forward into the future, what it's going to be worth in five or ten years.

The discount rate, on the other hand, you look at a dollar out in ten years and bring that back or discount that back to today.

Q For withdrawal liability purposes, what is your understanding of how ERISA law directs actuaries to select a discount rate to value unfunded vested benefits?

A Well, the law says, my understanding, is that it is the rate that reflects the best estimate of the actuary's anticipated experience under the plan.

ARBITRATION - VOLUME II

Q And what is your understanding of what the actuary's best estimate of anticipated experience under the plan means?

A Right. The experience under the plan that's being referred to there is the interest, the interest or investment return that you expect the fund earnings to achieve over time.

Q And in your judgment, is there a relationship between the investment return assumption that you --

MR. RICHMAN: Objection. It's about to be a leading question.

MR. MILLER: Look, I can lay a foundation and ask is there a relationship, but I'm sort of trying to move this along.

I can certainly lay the foundation.

ARBITRATOR IRVINGS: Lay the foundation.

MR. MILLER: Okay.

BY MR. MILLER:

Q Is there a relationship between the investment of return that an actuary expects

ARBITRATION - VOLUME II

fund earnings to achieve and the discount rate?

A Yes. They are essentially the same thing in most cases.

Q If an actuary selects a discount rate for valuing liabilities that is lower than the anticipated investment return, what is the effect of that?

A If the actuary chooses a discount rate that is lower than the investment return, that would necessarily mean that the liability be increased above what it would otherwise have been, higher than it arguably should be.

Q In your opinion, what should the relationship be between the investment return assumption used to estimate expected experience on assets and the discount rate to present value of the plan's future benefit obligations?

A Again, I think they are essentially the same number.

Q That opinion that you just expressed, that they are essentially the

ARBITRATION - VOLUME II

same number, is that consistent with basic actuarial principle?

A Yes, it is.

Q Are there, in fact, any actuarial principles that guide actuaries in how to select a discount rate for purposes of discounting future liabilities to present value in the multiemployer context?

A Yes. There's at least one guideline produced that's called ASOP Number 27 that guides members of the Academy, anyway, on how to choose an investment return assumption or discount rate.

Q And what is an ASOP?

A Sorry. An ASOP is Actuarial Standards of Practice that are promulgated by the Actuarial Standards Board.

Q And how do ASOPs govern how actuaries should select their assumptions?

A The ASOPs basically -- my recollection of ASOP Number 27 says that the discount rate is basically the investment return assumption.

Page 265

ARBITRATION - VOLUME II

Q Mr. French, can you turn your attention to Exhibit 10. It's in the white binder.

MR. MILLER: We have colors today.

BY MR. MILLER:

Q Mr. French, is this the ASOP that you just referred to?

A Yes, it is.

Q And what is it titled?

A It's Selection of Economic Assumptions for Measuring Pension Obligations.

Q And what is the date for this ASOP 27, the one that you are looking at, Exhibit 10?

A Adopted September 2007, updated effective May 1, 2011.

Q And do you know if this version of ASOP 27 has itself been updated since then?

A Yes, it has.

Q And when was that update?

A I believe in 2013.

Q And do you have an understanding of

Page 266

ARBITRATION - VOLUME II

when that updated ASOP 27 is effective?

A I believe it is in 2014.

Q So would the version of ASOP 27 that is Exhibit 10, would that have been the version of ASOP 27 in force at the time the NMDU Pension Fund here calculated the withdrawal liability imposed on The Times?

A Yes, it would.

Q Can you please turn your attention to Page 5 of this Exhibit 10. And in particular to Section 3.6.

And can you take a moment and just read to yourself the first three paragraphs of Section 3.6.

A Okay.

Q In your opinion, do these paragraphs set forth a general proposition -- strike that.

Let me lay a better foundation.

What is the title of Section 3.6?

A Selecting an Investment Return Assumption and a Discount Rate.

Q Thank you.

And in your opinion, do the initial

Page 267

ARBITRATION - VOLUME II

paragraphs of Section 3.6 set forth a general proposition by which actuaries should go about selecting investment return assumptions and discount rates?

A Yes, it does.

Q And what is that opinion?

A Very generally, a general rule is the appropriate discount rate is the same as the investment return assumption.

Q Do those paragraphs that you reviewed in Section 3.6 also state any exceptions to that general proposition?

MR. RICHMAN: Objection. It says what it says.

MR. MILLER: It says what it says.

ARBITRATOR IRVINGS: Yeah, it does.

BY MR. MILLER:

Q What is your understanding -- well, do you have an understanding whether these three paragraphs also state some exceptions?

A Yes, they do.

Q And can you please summarize your

Page 268

ARBITRATION - VOLUME II

understanding of those exceptions?

A The exceptions stated here -- and when reading the whole ASOP together which you kind of need to do to understand it really completely, but the two exceptions shown here are where there's a regulation or accounting requirement that something other than the investment return assumption be used to discount the future payments in order to determine the liability.

And there is a second exception shown here which is when the plan is unfunded or, in simpler terms, simply has no assets backing ASOP, there's no assets backing the liabilities, you clearly can't look at and expect an investment assumption.

Q And in what sort of situation or what sort of benefit plan would there be no assets set aside to support the liability process?

A For example, a retiree medical plan might not have -- isn't required by law typically have to an asset pool. Sometimes an executive benefit compensation plan

ARBITRATION - VOLUME II

doesn't have to have a dedicated pool of assets.

Q In the absence of either of those two situations that you described, do you have an opinion on whether it would be appropriate to use a discount rate other than the investment return assumption to present value liabilities?

A Would there ever be?

Q Let me say it again.

In the absence of either of the two exceptions described in 3.6, do you have an opinion on whether it would be appropriate to use a discount rate other than the investment return assumption to present value liability?

A Well, let me answer it this way. If one's looking for a best estimate of anticipated experience under a pension plan, then the answer would be no, I can't think of one.

Q And in your opinion when an actuary for a multiemployer plan selects an investment return assumption, are they

ARBITRATION - VOLUME II

required to do so by virtue of providing their best estimate of that anticipated experience?

A Yes.

Q In your opinion, what is the relationship, if any, between the exceptions to the general rule set forth in Section 3.6 and the context of withdrawal liability?

A The exceptions that are set forth in 3.6, the second exception, which is the plan that has unfunded or no assets, clearly doesn't apply to withdrawal liability.

And there is to my knowledge no rule or governing rule or accounting rule requiring an actuary to use a rate other than the investment return assumption for calculating withdrawal liability.

And, in fact, the natural reading of the law is this is the best estimate of anticipated experience under the plan. I'm not sure what else that could be besides the investment return assumption.

Q Can I turn your attention to 3.6.2 of the ASOP. It begins at the bottom of

ARBITRATION - VOLUME II

Page 5 and then goes on to Page 6 and Page 7.

Can you take a quick moment to review 3.6.2, and why don't you explain your understanding of that section.

A 3.6.2 shows two examples of acceptable methods of determining an investment return assumption.

Q What are those two methods?

A One of them is called a building block approach, and the second one is called the cash flow matching method.

Q And can you briefly summarize what the building block approach is?

A The building block approach basically looks at a core inflation number first and then builds upon that based on the type of assets that might be in the plan or that you are trying to determine an investment return on.

So if there's equities, you might figure out what kind of investment premium there would be over inflation and then build that onto the inflation rate. And the same

ARBITRATION - VOLUME II

sort of thing could apply for real estate or actually for debt, for that matter, for bond holdings.

Q In connection with multiemployer plans, in what circumstances would it be appropriate to use the building block method to develop an investment return assumption?

A In most situations. I mean, most plans have equities, they have real estate, they have bonds. This is a very flexible method to be used for almost any fund.

Q But in particular, would it be appropriate to use the building block method to develop the investment return assumption in connection with multiemployer plans that have a diversified pool of assets?

A Yes, absolutely.

Q What is the cash flow matching method?

A The cash flow matching method basically looks at all the series of payments that the Fund is going to be able to make and tries to match that against the duration of certain bond investments.

Page 273

ARBITRATION - VOLUME II
And it's a method that makes sense when you need to cash flow match for whatever reason, either because of a government standard or because you are trying to immunize a portfolio that has such investments in it.
Q And indeed, what type of portfolio of assets would make the cash flow matching method appropriate to be used by a multiemployer pension plan in developing its investment return assumption?
A Well, a plan, that has, for example, all government bonds or maybe corporate bonds in particular, particularly less callable-type duration bonds.
Q And what about for a plan that has a diversified pool of assets including assets in equity?
A I don't think this method would make sense because there's no way under this method to, for example, try to figure out the return on the equity portion.
Q Based on your review of the financial statements for the NMDU Pension

Page 274

ARBITRATION - VOLUME II
Fund and the Form 5500s for the Pension Fund, do you have an opinion on whether the Pension Fund here used either the building block or cash flow matching method to come up with its investment return assumption?
A Well, I don't think it could have used the cash flow matching method, but it could certainly have used the building block method.
Q And why is that?
A Because of the return assumption that they've had, basically a consistent 7.5 percent return, would be the type of return I would expect under a building block approach. I don't believe you would get to that type of return under a government bond portfolio in this day and age.
Q Just to elaborate on that some more.
What is the nature of the portfolio of assets that would be needed to have an investment return assumption in these times of approximately 7.5 percent?
A A fairly well-diversified portfolio

Page 275

ARBITRATION - VOLUME II
that's fairly heavy in equities, real estate, commodities or other alternative-type investments and not terribly heavy on the fixed income side.
MR. MILLER: Mr. Arbitrator, I now would like to introduce into evidence one of the objected exhibits.
It's Objected Exhibit 4.
And Mr. Arbitrator, this exhibit has been objected to by the Fund on relevance grounds, so I thought if I might to try and lay a foundation for relevance.
ARBITRATOR IRVINGS: Go ahead.
MR. MILLER: Thank you.
BY MR. MILLER:
Q Mr. French, do you recognize this document?
A Yes, I do.
Q And what is this?
A This is the ASOP Number 27 adopted by the Actuarial Standards Board September of 2013.

Page 276

ARBITRATION - VOLUME II
Q And is this document the revised version of ASOP 27 that you referred to in your testimony moments ago?
A Yes, it is.
Q Do you know whether this version of ASOP 27 makes any changes to Section 3.6?
A Yes, my recollection is --
MR. RICHMAN: I'm going to object now and we have a enough of a foundation.
What we know is that this does not govern the calculation that was done. The "this" being the Objected Exhibit 4.
And so I'm not really sure why we're spending time going through this. In fact --
ARBITRATOR IRVINGS: Let's find out.
MR. MILLER: Let's find out.
May I continue to lay the foundation?
MR. RICHMAN: No, you can't.
ARBITRATOR IRVINGS: Just explain why we are doing this.

ARBITRATION - VOLUME II

MR. MILLER: The updated ASOP clarifies the statements made in the ASOP version that was used for purposes of coming up with an investment return assumption in this matter as it relates to the question of best estimate. And it clarifies and provides additional meaning to the term "best estimate."

And the concept of best estimate is important and we believe crucial as it relates to the legitimacy of the investment return assumption and discount rate that was employed to calculate the present value of liabilities for this withdrawal liability assessment.

MR. RICHMAN: It revises. It doesn't clarify.

MR. MILLER: And I'd like --

MR. RICHMAN: Excuse me.

MR. MILLER: I would like the expert to give his opinion on that subject.

MR. RICHMAN: We are going to

ARBITRATION - VOLUME II

have both experts to talk about it and we'll have a little issue with respect to the document.

It revises. It doesn't clarify.

And even if it's really just to clarify, it doesn't matter. It wasn't in force at the time this calculation was done. It doesn't govern. Their expert has already testified that it doesn't govern.

A later clarifying rule doesn't come into play, period.

ARBITRATOR IRVINGS: Go ahead.

MR. MILLER: The lay opinion of whether this revised ASOP clarifies or doesn't clarify is in my judgment not material. We should hear from the actuaries on that subject.

And to repeat, the issue of what constitutes a best estimate is an important one here.

And we think that the testimony that Mr. French is going to give on how this update impacts what the version that

ARBITRATION - VOLUME II

was in effect says on the subject of best estimate is important. And you as the arbitrator will give it the weight that you deem it deserves.

ARBITRATOR IRVINGS: Well, how would a clarification -- let's assume sort of a summary judgment standard here --

MR. MILLER: Okay.

ARBITRATOR IRVINGS: How would a clarification that was not available at the time the calculations were made in any way govern, since they didn't have the benefit that clarification at the time they made --

MR. MILLER: Sure. It doesn't govern, but the clarification will guide the legitimacy of the interpretation of the old version of ASOP 27 at the time it was made.

So to the extent that a determination and interpretation of the operative version of ASOP 27 was made on

ARBITRATION - VOLUME II

the subject of best estimate, the new version, to the extent it clarifies, demonstrates whether the interpretation that was given to the old version at the time was correct.

MR. RICHMAN: First of all, that doesn't shed any light on how those people who were doing calculations at that time would use something that hadn't actually been put out.

MR. MILLER: It's also --

MR. RICHMAN: Excuse me, I'm not finished.

Secondly, there was an interpretation with respect to this that was put out by the American Academy that talked about how the range should be looked at. It was there at the time that people did these calculations.

That is what governs, not a revision, even clarification of ASOP 27.

MR. MILLER: Finally, Mr. Arbitrator, I'll mention that as

ARBITRATION - VOLUME II

indicated here, this updated version was passed in September 2013, and it was indeed in September of 2013 that the calculation and the assessment here was made.

MR. RICHMAN: Well, the assessment, I don't know exactly when the actual calculation was made, but the assessment goes back to a period of time. The actual date of the calculation, the date for which the calculation is done was years before that.

And it doesn't make any sense to have this out here.

The calculation was apparently prepared, I'm being told by wire here, in August of 2013.

This is not even effective according to their own actuary until 2014.

MR. MILLER: The document discusses the various draft versions, and what became the updated ASOP 27

ARBITRATION - VOLUME II

was first discussed and aired by the actuarial community in as early as January of 2011.

MR. RICHMAN: And the calculation was as of 2009.

ARBITRATOR IRVINGS: I think what's applicable is what was in effect at the time.

MR. MILLER: Okay.

BY MR. MILLER:

Q I'm now going to ask you a couple of questions about the investment return assumption that the Fund here developed and applied.

Did you indeed have an opportunity to review the audited financial statements of the Pension Fund here?

A Yes, I did.

Q And based on your review of those statements, is the Pension Fund here a funded plan in the sense that it has a pool of invested assets?

A Yes, it does.

Q Do you know what the investment

ARBITRATION - VOLUME II

return assumption is for this pension?

A The actuary was using for regular funding purposes 7.5 percent.

Q And how do you know that it was and is 7.5 percent?

A From the Schedule B to the Form 5500 as well as the annual valuation reports produced by the Fund actuary.

Q Let's take a look at one of those actuarial reports.

Let's look at Exhibit 24.

Is Exhibit 24 one of the annual actuarial reports that you reviewed?

A Yes, it is.

Q Can you turn your attention to the page that's marked on the bottom left SEGAL-000551.

A I found it.

Q Good.

And can you read the third line, the third heading. Third under "Age of Spouse."

A "Net investment return, 7.5 percent."

ARBITRATION - VOLUME II

Q Yes. And what do you understand that to mean?

A The net investment return is essentially the actuary's best estimate of the return assumption of the asset pool under this plan. You know, basically an average of what it will be from now till the end of the last benefit payment is made from this Fund.

Q And do you have an opinion about whether actuarial principles require the actuary to use his or her best estimate in developing this investment return assumption?

A Yes, I do.

Q And what is that opinion?

A That the best estimate is required under the law, is required under the actuarial standards in part as a result of that.

Q Am I correct that you reviewed other annual actuarial valuations for this Pension Fund?

A Yes, I have.

ARBITRATION - VOLUME II

Q And was this 7.5 percent investment return assumption consistent throughout the actuarial valuations that you reviewed for this Fund?
A Yes, it was.
Q In your experience -- strike that.
Do you have an opinion about whether the 7.5 percent investment return assumption is typical or unusual for a multiemployer plan of this size?
A I do.
Q And what is that opinion?
A It is quite typical, quite frankly, for a plan of this size invested the way I believe this plan is invested.
Q And in connection with this engagement, did you have occasion to review the asset mix for this Pension Fund?
A Yes, I did.
Q And where did you find that information?
A In the annual accounting reports or audit statements, financial statements.
Q Can you turn your attention to

ARBITRATION - VOLUME II

Exhibit 75, which should be in the light-blue binder.
And, Mr. French, can you turn your attention toward the back end of the document, and it's the page entitled FUND-0001640.
Again, it's toward the back end.
A Yes, I've found it.
Q And can you please review its contents for a moment.
A Okay.
Q And what is your opinion about what this page reflects in connection with the Pension Fund's assets mix?
A Well, it shows a breakdown as of, in this example, May 31, 2012, and May 31, 2011, of the various types of investments that the Fund has both by name and the name happens to have in it a descriptor that would give me a pretty good idea of what type of investment those funds are.
Q And based on those descriptors, what conclusions do you draw about the asset allocation mix in the Pension Fund here?

ARBITRATION - VOLUME II

A Well, that it's a fairly typical mix for a plan of this size and type, that it's fairly heavily invested in equities. Also has some real estate and has some -- a bond portfolio as well, along the lines of what we pretty typically see for a multiemployer plan.
Q And you'll notice that this page is Page 10 of a document. And if you go back to FUND-0001631 in this exhibit, that is a letter.
And what is your understanding of that letter, and what is your understanding of what document you've been looking at that is part of the Form 5500?
A This is the independent auditors' report. It's been signed by the auditor or the firm of auditors basically saying that they've audited statements and what they did and that they looked at it in terms of general auditing standards of the United States.
Q And did you also in connection with your engagement review other audited

ARBITRATION - VOLUME II

financial statements for this Fund for other years?
A Yes, I did.
Q And for approximately what years?
A I think it was from 2008 through 2013.
Q Okay. And did you also review the discussions of asset allocations that are contained elsewhere in the Form 5500?
A Yes.
Q And based on those reviews of both the audited financial statement information and other information about asset allocations contained in the Form 5500, do you have an opinion about whether the asset allocations in this Fund have been consistent in the last number of years?
A Yes, I do.
Q And what is that opinion, sir?
A That while they have bounced around a little bit, not unusual given the kind of cash flows that the Fund has and the different investment performances over time, but that they have been fairly steady over

ARBITRATION - VOLUME II

that period of time. They ended up pretty much where they were at the beginning.

Q And based on your review of this Fund's assets statements and your understanding of the general asset allocations for this Fund in particular, do you have an opinion about whether a 7.5 percent investment return assumption is reasonable?

A Yes, I do.

Q And what is that opinion?

A 7.5 percent strikes me as very reasonable and consistent and not unusual.

Q And indeed why is that? Why is your opinion that this is reasonable and consistent?

A Because based on the asset allocations that I inferred from the statements, that type of return is what I would expect over time. And the Fund actuary has also certified that that is what she believes to be a best estimate return.

Q Now I'm going to ask a series of questions about actuarial assumptions and

ARBITRATION - VOLUME II

actuarial assumptions in connection with funding.

Aside from -- putting aside a withdrawal liability situation, under what circumstances, if any, would a multiemployer pension plan have a need to discount to present value its future benefit obligations?

A Well, for one thing, under their regular Internal Revenue Code required funding rules, there's minimal funding requirements and maximum tax deductible rules that are spelled out under the Internal Revenue Code.

And for those purposes, very similar calculations to what needs to be done for withdrawal liability needs to be done for those purposes as well.

Q In your experience, do multiemployer pension plans -- strike that.

I'll lay a better foundation.

Do you have an opinion, Mr. French, about whether multiemployer pension plans generally discount their future benefit

ARBITRATION - VOLUME II

obligations when calculating their ordinary funding needs?

A Yes.

Q And in doing so, what do they use as the discount rate when calculating their ordinary funding needs?

A They ordinarily use the investment return assumption.

Q And in your opinion, does it make sense to use the investment return assumption as the discount rate to present value benefit obligations in connection with funding?

A Yes, absolutely.

Q And why is that, sir?

A Because if the fund uses -- if the fund is vested fairly heavily in equities and there is an anticipation that the fund will earn a high investment return, then a lower amount of assets, a lower amount of contributions is needed in the fund.

If, on the other hand, there is an expectation of a lower investment return, then that would necessarily require a larger

ARBITRATION - VOLUME II

amount of money, large amount of contributions in order to make the benefit payments. That's the whole point of the minimum funding requirements.

Q Mr. French, in your experience -- strike that.

Do you have an opinion about whether multiemployer fund trustees generally prefer a higher or a lower discount rate when they're valuing liabilities for ordinary funding purposes?

A For ordinary funding purposes, I would expect they would typically prefer a higher discount rate.

Q And why is that?

A Because, as we discussed earlier, higher discount rate means lower liabilities and, therefore, is easier to meet the minimum funding rules. And they could have less contributions to provide the same or higher benefits than if they're using a lower discount rate.

Q And do you have an opinion on whether, especially since the capital market

ARBITRATION - VOLUME II

decline in 2008, multiemployer fund trustees generally prefer a higher or lower discount rate when they're calculating withdrawal liability?

A Yeah.

Q And what is this opinion?

A For withdrawal liability purposes, there's more of a tendency to prefer a lower discount rate.

Q And why is that?

A Because the, again, lower discount rate, as we mentioned earlier, provides a higher liability, and a higher unfunded liability means higher withdrawal liability payments.

Now, that does two things that are generally to be considered favorable to most trustees.

One is it makes it a much bigger incentive for the employer to stay in the plan, or, rather, a bigger disincentive to leave the plan.

And at least if the employer leaves the plan, it provides for a larger amount of

ARBITRATION - VOLUME II

money coming in than if there were a higher discount rate.

Now, that obviously makes it easier for the ongoing employers to fund the benefits. And certainly for the Union side, it makes it easier. The Union doesn't have to negotiate large contribution increases or perhaps benefit declines they otherwise would have to do if there was less money in the plan.

Q In your opinion, are you seeing a trend in connection with using lower discount rates to calculate withdrawal liability?

A Yes, I am.

Q And why is that?

A Well, the reasons are as we just spoke about earlier.

The trustees are going to want that -- is favorable in the view of most trustees. There may be some exceptions where an employer plans on being in the fund for a very long time, but for most trustees it would be preferable to have a lower

ARBITRATION - VOLUME II

interest rate environment.

And, you know, there's ways to apply pressure on professionals to try to get to a lower rate than a higher rate.

Q Do you know what rate the Pension Fund here used to discount its liabilities for ordinary funding purposes?

A For ordinary funding purposes, yes. That was 7.5 percent.

Q And did the Pension Fund here also use that same rate to discount its liabilities when calculating The Times' withdrawal liability?

A Yes, they did. A different rate. Yes, they used a different rate.

Q So they did not use 7.5 percent as the discount rate to value liabilities when calculating withdrawal liability?

A That's correct.

Q While we'll get into specifics shortly, how did that change in the discount rate affect the withdrawal liability assessment against The Times?

A The lower discount rate increased

ARBITRATION - VOLUME II

The Times' withdrawal liability.

Q Putting aside the discount rate, are there other assumptions that an actuary has to make in computing a plan's ordinary funding needs?

A Yes, there are other assumptions.

Some examples would be the mortality rate assumption, the percentage of the retirees who are married, the age at which nonretired participants would commence benefits. Those are kind of the key ones.

Q Okay.

And these assumptions that are used in connection with the plan's ordinary funding needs, are assumptions on these issues also required to be made in order to compute withdrawal liability?

A Yes, they are.

Q And why is that?

A The calculations are really very similar. I mean, there's not -- while there are some minor technical differences, they are essentially the same calculations for the same purposes.

Page 297

ARBITRATION - VOLUME II
Q And in the course of your review, did you review the other actuarial assumptions that the actuary applied here in calculating The New York Times' withdrawal liability?
A Yes, I did.
Q And do you have an opinion on whether, aside from the discount rate, the Pension Fund here used similar or different assumptions on these issues for withdrawal liability than for ordinary funding purposes?
A Yes. Aside from the discount rate or investment return assumption, they used the same assumptions for withdrawal liability purposes as they did for regular funding purposes.
Q Now I'd like you to turn to the white book and to Exhibit 1.
A Okay.
Q And what is this document, sir?
A This appears to be the withdrawal liability assessments from the Fund to The New York Times.

Page 298

ARBITRATION - VOLUME II
Q And can you turn your attention, it's about a little less than halfway through the document to the page that's marked FUND-000730.
A Yes.
Q And can you read to yourself the first sentence.
A Yes.
Q What do you understand that to mean?
A Basically what it says, that the actuarial assumptions used for the withdrawal liability calculations and the withdrawal assessment were the same as used for plan funding, with the exception of the investment return and the expense charge.
Q And what's an expense charge?
A Expense charge is a load, sometimes on the liabilities, to account for the plan's administrative expenses.
Q And do you have an understanding of why the Pension Fund here may have, as indicated, used different assumptions respecting the expense charge for withdrawal

Page 299

ARBITRATION - VOLUME II
liability as it did for plan funding purposes?
A Well, I have an idea that they are using a regulation from the PBGC to determine their discount rate or their investment return assumption. And that regulation or rule from the PBGC has attached to it an accompanying expense load calculation.
So very often when you use these rates you use the expense load that's in that same or associated with that regulation.
Q So is the change to the expense load or expense charge necessarily the byproduct of the change that was made in the investment return rate?
A It is related to it. It could certainly be a byproduct of it.
Q Okay. Thank you.
Now I want to ask a couple questions about a concept called the Segal blend.
Are you familiar with the term

Page 300

ARBITRATION - VOLUME II
"Segal blend"?
A Yes, I am.
Q And what do you understand that to mean?
A It's basically a shorthand for a methodology predominantly used by the Segal Company where they effectively blend the regular ongoing valuation interest rate with these PBGC interest rate assumptions.
Q And how does that blending generally work?
A Basically, it's for up to the value of the plan assets, the PBGC rates are used.
For liabilities in the excess of the value of the assets, the regular plan funding rates are used.
Q And these different rates are used to value the liabilities, correct?
A Correct.
Q And what is your understanding of what is meant by "the PBGC rates"? What are the PBGC rates?
A In this instance, the PBGC rates are rates published by the PBGC, which from

ARBITRATION - VOLUME II

my understanding are derived from annuity purchase rates. The PBGC solicits or has some way of getting input on annuity purchase rates from insurers, and then by some methodology that's not clear, that I don't believe the PBGC publishes, they convert those rates, those rates into basically these discount rates that they show in the regulations.

Q Let me ask a base, fundamental question.

Are the PBGC rates interest rates?

A They are really discount rates, I would say, more than anything else, but sometimes people may use the term "interest rate."

Q And you indicated that the PBGC rates or PBGC interest rates are derived by that agency from commercial insurance company annuity purchase rates; is that correct?

A Correct.

Q What is your understanding of how insurance company annuity rates are derived?

ARBITRATION - VOLUME II

A My understanding of how insurance company annuity rates are derived is insurance companies look at the duration of the obligations they're picking up, and they look at the kind of corporate bond portfolio that would kind of match up with it, and that's what they use to typically price their annuities.

Q Do you have an opinion on the relationship, if any, between PBGC rates and rates at the time the PBGC rates are published for high-grade corporate bonds?

A They should be kind of similar.

Given my understanding of how the PBGC rates are determined and how insurance company rates are determined, then one ought to be kind of a proxy for the other, although, in my experience, PBGC rates tend to be a bit lower.

Q Are you familiar with the term "risk-free rate"?

A Yes, I am.

Q And what does the term "risk-free rate" mean to you?

ARBITRATION - VOLUME II

A It's a rate that's associated with bonds or other debt obligations that essentially have no risk of repayment or no default risk.

Q Is the concept of risk-free rate a concept that multiemployer plan actuaries routinely use in their practice or routinely consider?

A Routinely consider? Only in terms of maybe setting up a building block approach to setting their investment return.

Q Do you have an opinion on whether high-grade corporate bond rates are a type of risk-free rate?

A I think they're often considered a type of risk-free rate or very close to a risk-free rate.

ARBITRATOR IRVINGS: High-grade corporate bond, is that what you said?

MR. MILLER: Yes, I did.

BY MR. MILLER:

Q And what other types of securities might fall into the bucket or a concept of

ARBITRATION - VOLUME II

risk-free securities?

A US Government bond.

Q What is your understanding of the origins of the Segal blend method?

A My understanding is that the Segal blend methodology dates back to the 1980s sometime after MEPPA was enacted. And it was, I believe, put in effect at a time when many multiemployer plans had very heavy fixed income portfolios.

And at the time fixed income investments were earning higher than most actuaries were typically using for their regular funding assumption.

So in actuality at the time it was put into place, the methodology actually ended up with lower withdrawal liabilities than was the case under the regular funding rules.

So, yeah, I think the basis for it was that would make the withdrawal liability calculations a little less susceptible to challenge because who is going to challenge a number that's higher than what they think

ARBITRATION - VOLUME II
it should be, or lower -- who is going to challenge a number that is lower.
ARBITRATOR IRVINGS: I was going to ask you about that twist.
MR. MILLER: I was going to ask a clarifying question.
ARBITRATOR IRVINGS: Just making sure we are paying attention.
THE WITNESS: Makes me feel better.
MR. MILLER: Thanks.
BY MR. MILLER:
Q In your experience, is the Segal blend commonly used today by multiemployer plan actuaries?
A In my experience, it's almost exclusively used by actuaries at the Segal Company, but it's not commonly used by actuaries outside of the Segal Company.
Q Do you as an actuary use the Segal blend when calculating or estimating withdrawal liability for multiemployer funds for which you are or were the enrolled actuary?

ARBITRATION - VOLUME II
A I'm not an enrolled actuary now but in the plans where I was the enrolled actuary, I did not use the Segal blend method.
Q Why did you not use the Segal blend method?
A In my view, the Segal blend method has nothing to do with my idea of the best estimate of the return of the fund and, really, in most cases could not be the best estimate of the investment return -- anticipated return under the fund.
Q So can you explain why in your judgment the Segal blend method is in conflict with actuarial best estimates of anticipated experience?
A Because the Segal method doesn't take into account how the fund is actually invested or intended to be invested, and it assumes that a certain part of the assets are going to be basically invested in fixed income securities.
And unless that's the trustees' intent, I don't see how that can be a best

ARBITRATION - CONFIDENTIAL
estimate of the plan's anticipated investment returns.
Q Has your position on use or, more particularly, the inapplicability of the Segal blend method ever caused you difficulties with a client for which you were serving as the enrolled actuary?
A Yes, it has.

(Whereupon, the following testimony is deemed Confidential:)

ARBITRATION - CONFIDENTIAL
BY MR. MILLER:
Q And what client is that?
THE WITNESS: Are we stipulating this is confidential?
MR. MILLER: Mr. Richman?
MR. RICHMAN: Yeah, I think all of the actuarial stuff should be confidential.
MR. MILLER: And we agree.
ARBITRATOR IRVINGS: Okay. Yes.
THE WITNESS: So everything I'm talking about here on will be confidential.
MR. RICHMAN: During this proceeding.
ARBITRATOR IRVINGS: This is not a free pass for the rest of your life.
MR. MILLER: No free passes for Mr. Richman.
BY MR. MILLER:
Q Go ahead.
A The client was the Central States

ARBITRATION - CONFIDENTIAL
Teamsters Fund.
Q And can you describe what the difficulties were and the upshot in connection with that client and your position on the inapplicability of the Segal method?
A This client, the Central States Teamsters Fund, when I was the actuary in 2005, 2006 into early 2007, I think, was experiencing great difficulties. It was a very unfunded plan.
And United Parcel Service, UPS, was the largest employer in the fund, and it was pretty well known that they wanted to get out and they were very likely going to be pulling out of the fund. And everyone from Hoffa, Junior to -- you know, wanted to make sure either keep them in the fund or, if they're leaving, that they're going to pay a very hefty price for it.
And so eventually the understanding became, well, withdrawal liability assumptions would be a good way to do that.
However, you know, I had never used

ARBITRATION - CONFIDENTIAL
the Segal blend and was not really comfortable with the idea of the Segal blend. So they decided to hire Segal to be the fund's actuary because Segal was well known as having used that and having -- at least it would not be as suspicious a change.
Q So you were terminated by the Central State's Teamsters Fund as its enrolled actuary?
A Correct.
Q And as a consequence of this matter?
A Correct.
Q And did they in fact retain Segal?
A They did.
Q And did UPS indeed withdraw?
A They did.
Q And was the Segal blend method indeed applied to determine the withdrawal liability?
A To the best of my knowledge. I did not see the calculation.
(End of Confidential portion.)

ARBITRATION
BY MR. MILLER:
Q Let's return to the subject of application of PBGC rates and calculation of withdrawal liability.
Can you think of any reason to use PBGC rates, particularly in the current environment, in calculating withdrawal liability if the actual multiemployer pension plan's assets are not invested in high-grade corporate bonds or equivalent low-risk investments?
A Well, it wouldn't make sense to me under a standard where you need to have the best estimate of anticipated experience under the plan.
Q And why is that?
A Because the expected return on such a fund would be higher than the PBGC rates, probably considerably higher in this day and age.
Q Do you have an opinion on whether the Segal blend represents an actuarially reasonable approach to valuation of a plan's unfunded vested benefits for withdrawal

ARBITRATION
liability purposes?
A I do.
Q And what is that opinion?
A My opinion of that is actuarial unreasonable in the aggregate.
Q And why is that?
A Because the funding assumptions -- they're using the regular funding assumptions which are reasonable and have attested they're best estimates for every other purpose except for the investment return assumption.
Now, for regular funding they are attesting to the 7.5 percent as being the best estimate of the anticipated experience or investment return under the fund which makes sense. And I certainly believe and concur with that.
But then they inexplicably use a lower rate for that one purpose and that one purpose only. And that one rate has a very material impact on the obligations.
Q Who serves as the actuary for the NMDU Pension Fund here?

ARBITRATION

A My understanding it's the Segal Company.

Q And do you have an understanding whether the Segal Company in fact used the Segal blend method to calculate withdrawal liability against The New York Times?

A Yes, they did.

Q And did you calculate the monetary impact of the use of the Segal blend assumptions here as opposed to the use of the ordinary 7.5 percent funding rate?

A Yes, I did.

Q And can you summarize what your calculation was of that differential?

A My calculation was somewhere above $19 million versus the Fund's calculation I think close to $26 million.

So divide what they calculate by what I calculated is about a 33 percent difference; 33 percent higher than the value I would have gotten using the Fund's regular assumptions.

Q And briefly summarize how you went about making that calculation.

ARBITRATION

A The numbers that I needed to do the calculation were already in the Segal reports.

So I simply redid the calculations, only changing the assumption in the last year, the number I had readily available, and was able to redetermine what the withdrawal liability would have been based on that assumption.

Q Well, let's drill down on that some more.

A Okay.

Q What method does this multiemployer Pension Fund use to calculate withdrawal liability?

A They use the so-called presumptive method.

Q And how many years in looking back on underfunding does a multiemployer plan examine in connection with application of the presumptive method?

A The presumptive method goes back 20 years in valuations. So there's 20 years of calculations to review.

ARBITRATION

Q I see.

In calculating the monetary impact of the use of the Segal blend assumptions here, were you able to go back the full 20 years?

A No, I was not.

Q So do you have an opinion on whether the impact that you did calculate, the roughly 6, $7 million impact is the precise calculation of the impact?

A It is only precise if the assumption were to change in that year, and that's probably not the best way to do it.

So it is probably not the precise answer.

Q Okay. And what would you need to do to make the precise calculation of the impact of application of the Segal blend on the withdrawal liability assessment against The Times?

A I would need really the last 20 years of reports and all of the backup calculations. There is a lot of complications that would get involved in

ARBITRATION

that.

Q Have you made any estimate on what the amount would be if you in fact received all of the data going back the 20 years to perform that calculation?

A I have made some further estimates, yes.

Q And what is that estimate?

A Since this came up in my deposition as to whether, you know, what impact it might have and I think some guesses at the time, I looked back at what I did have which was four years going back from, I think from May 31, 2009.

And based on that, the number that I calculated would have been even lower than what I calculated using just the last year by roughly another half a million dollars.

Q And by "the lower number," you mean the withdrawal liability number?

A Yes, lower withdrawal liability number is what I mean.

Q And I think you previously testified that you did review the other

ARBITRATION

actuarial assumptions that Segal employed in estimating and valuing the Pension Fund's unfunded pension benefits for withdrawal liability purposes.

Is that a correct summary of your prior testimony on that subject?

A Yes, it is.

Q And those assumptions were in what regard? What types of additional assumptions were they?

A Those were the Mortality Table assumptions, the percentage of retirees, married retirement rate assumptions and any other assumptions that were shown in the report.

I reviewed those against my general knowledge of multiemployer plans and the specific type of plans and plan provisions they had. And they all struck me as perfectly reasonable in line what I would typically expect assumptions to be.

Q Thank you.

With that in mind, assuming that these other assumptions that were employed

ARBITRATION

were actuarially reasonable, do you have an opinion on whether the actuarial assumptions used to compute the unfunded vested benefits here for this withdrawal liability calculation were reasonable or unreasonable in the aggregate?

A I do have an opinion.

Q And what is that opinion?

A That they were not reasonable in the aggregate.

Q And why is that?

A Because all of the assumptions but one were reasonable and presumably best estimate assumptions.

The one assumption that was not was an assumption that was an investment return assumption which was much lower than what appeared to be the best estimate return. And that one assumption has a very large impact on the numbers. It's the most important assumption.

And like I said, there's no counterbalancing other assumption that would go in the other direction that would even

ARBITRATION

allow in the aggregate to be reasonable. And, you know, as we've stated earlier, the impact is significant, at least 33 percent.

Q By virtue of calculating the withdrawal liability for The Times using the Segal blend as opposed to the ordinary 7.5 percent fund rate, do you have an opinion on whether there will be an impact on the other contributing employers to the Pension Fund if the 7.5 percent best estimate is ultimately realized?

A Yes.

Q And what is that opinion?

A Well, as I mentioned earlier, by one employer paying more than its fair share, by one employer paying based on a low discount rate but the Fund actually achieving a high investment return, it means that portion of the plan would become more than fully funded.

Since it's one pool of assets to provide for one set of benefits, the other employers would necessarily get the benefit of that 7.5 percent return over the Segal

ARBITRATION

blend return.

Q And just to drill down on this a little further.

So do you have an opinion on whether employers would be better off or worse off following the withdrawal of The New York Times in the event the best estimate of 7.5 percent is obtained relative to where they would be if there had not been an assessment of withdrawal liability?

A Yes. For reasons that we just stated, the other employers are better off because The Times is essentially overfunding its portion of the unfunded benefits.

Q And in such event, would The Times in effect be paying more or less than its allocable share of the unfunded vested benefits in the Pension Fund?

A More.

Q Mr. French, I recall you testified moments ago that you do not use the Segal blend approach when you -- or did not use the Segal blend approach when you served as an enrolled actuary to a multiemployer fund.

Page 321

ARBITRATION

What was your practice in connection with calculating or estimating withdrawal liability?

A My typical practice on withdrawal liability was to use the same investment return assumption as for regular funding.

Q Was there ever an occasion in which you departed from that general practice?

A Yes.

Q And what was that?

A I think on one occasion where under the Consolidated Retirement Fund, was a client of mine --

Q And can you explain the circumstances in connection with that departure from your practice?

A Yes.

The Consolidated Retirement Fund is a fund who had basically four large key employers. One of those employers, UNITE HERE, was threatening to leave the fund. It was probably one of the strongest financially of the employers. And the second employer, I think was Amalgamated

Page 322

ARBITRATION

Bank, was in grave danger of going out of business. And there were other issues with some of other employers especially related, as they're kind of interrelated entities in some respects.

So there was a concern that there would be a very large withdrawal or several large withdrawals from the plan and whether in the event of that occurring, what would happen to the fund.

And, you know, trustees in this fund were also plan participants. This was a union staff fund where the trustees of the fund had very large, very substantial benefits being paid from this fund.

So their indication to me was, look, if this kind of thing happens, we're going to have to change -- we are not going to invest -- this was a fund that was invested very heavily in equities and real estate and alternative investments. They're going to very seriously consider changing the investment portfolio mix if these strong employers withdraw from the plan.

Page 323

ARBITRATION

And in that circumstance, the liabilities of the fund would go up.

So in anticipation of that occurring, the withdrawal liability was changed -- well, I changed the withdrawal liability assumptions to reflect that possibility or that if a big employer or two or more withdrew from the fund and the trustees were going to change the investment mix so that it would be a more conservative -- and "more conservative," meaning lower investment return portfolio -- then, of course, that would make sense to use a lower withdrawal liability assumption.

Q And in that situation, did you have an expectation of what the funding rate would be in connection with that plan following the withdrawal of one or more of these significant contributors?

A Yes. If the withdrawals indeed occurred and the trustees followed through and changed the investment portfolio, investment mix to be more conservative, then, of course, the ongoing regular funding

Page 324

ARBITRATION

assumptions would change to a lower discount rate as well.

Q And did you have any expectation of whether and the extent to which that revised funding rate would migrate to the withdrawal liability discount rate?

A Well, at that point --

ARBITRATOR IRVINGS: I'm sorry. I missed that.

MR. MILLER: Sure.

BY MR. MILLER:

Q Did you have any expectation of whether the revised funding rate that would occur as a consequence of the change in the investment of assets would migrate to the withdrawal liability discount rate that you had determined?

ARBITRATOR IRVINGS: I guess I'm confused because I thought he just said that he started with the lower rate for withdrawal liability and then said it would migrate to the funding.

MR. MILLER: Why don't you

ARBITRATION

clarify.

THE WITNESS: What I said, I would expect that the funding rate, once the trustees actually changed the portfolio and the withdrawal actually occurred, the funding rate would come down.

And, of course, at that point the funding rate and the withdrawal liability rate would be more or less in concert unless, of course, we expected further withdrawals and further making more conservative investments in the fund that would then require or necessitate a further lowering of the regular funding rate.

ARBITRATOR IRVINGS: Okay. Got it.

MR. MILLER: Thank you.

BY MR. MILLER:

Q How were you advised in connection with this matter of the anticipated changes to the investment asset mix?

A Well, as you can imagine, this was

ARBITRATION

a very big concern.

There were quite a number of meetings surrounding this and, you know, what are we going to do.

And my meetings with some of the trustees, I asked that very question: In the event of this withdrawal, would you change the investment portfolio and make it more conservative? And of course given that this was their pensions, they said, Yes, yes, we would.

Q And who was fund counsel at the time of this matter?

A Ron Richman.

Q And did you document your reasoning for departing from the funding rate in that matter and using a lower discount rate for the forthcoming withdrawal?

A Yes, I did.

Q And why don't you describe what that document was and how it's used.

A Well, I don't have the document. I don't remember exactly what was in it, but my recollection is that there were concerns

ARBITRATION

about this, you know, there would be challenges to this, that we wanted to document it carefully.

So I do remember we wrote it carefully. Ron looked at it, reviewed it, we sent it out to the trustees.

And it basically set forth the rationale as to why we're doing it and I believe it set forth kind of how we came down to the number.

Q Just to confirm, do you have a copy of that memo?

A No, I don't.

Q Do you happen to know whether the investment mix changes ultimately were made?

A To the best of my knowledge, they were not.

Q And why was that?

A To the best of my knowledge, no employer or no substantive employer ever withdrew from the fund.

Q Do you continue to serve as the enrolled actuary for the Consolidated Retirement Fund?

ARBITRATION

A No.

Q And when did you stop serving in that capacity?

A I believe when I left employment with Buck in July or so of 2013.

Q Switching subjects.

Have you had a chance to review the expert report filed in this matter by the Fund's expert actuary, Dr. Ethan Kra?

A Yes, I have.

Q Do you have an understanding of whether Dr. Kra agrees with use of the Segal blend method?

A My understanding from his report is that he does not.

Q He does not?

A Does not.

Q And what is your understanding of why the Fund's own expert disagrees with use of the Segal blend method?

A My understanding is Dr. Kra believes that withdrawal liability ought to be calculated purely on a risk-free based approach.

Page 329

ARBITRATION
Q And that would be as opposed to the blending approach that you described for the, indeed, Segal blend method?
A That's correct.
Q And do you have an understanding of whether Dr. Kra believes that the risk-free rate should be employed even if the fund that is employing that risk-free rate has assets that have an expected return above a risk-free rate?
A That is my best understanding based on his report and his deposition.
Q Do you agree with that?
A I do not.
Q And why not?
A I don't because it seems the wording of the law is that this has to be the actuary's best estimate of anticipated experience under the plan.
Well, the only experience that the plan can have is the actual investment return. And if the plan is not invested in purely risk-free investments, it is going to be expected to have a higher return. Your

Page 330

ARBITRATION
best estimate is going to be a higher number than the risk-free return; otherwise, why would you be investing in those things.
Q In your experience, is it common for actuaries to use the risk-free rate as the discount rate for funding purposes?
A For regular funding purposes, no. I don't know that I've ever heard of that. At least -- except for a fund that was invested purely in risk-free investments.
Q What about using the risk-free rate as the discount rate for withdrawal liability purposes, is that commonly done by actuaries?
A It's not commonly done by actuaries, but that, I have seen.
Q Would you describe that practice as unusual?
A I would describe that as unusual, yes.
MR. MILLER: Mr. Arbitrator, I have about ten minutes, tops, so should I just continue and finish up the direct?

Page 331

ARBITRATION
ARBITRATOR IRVINGS: Might as well.
THE WITNESS: I'm fine. Thank you.
ARBITRATOR IRVINGS: Do you need a break?
MR. RICHMAN: No.
ARBITRATOR IRVINGS: Finish the wrap then.
MR. MILLER: Sure. Thank you.
BY MR. MILLER:
Q What do you understand to be Dr. Kra's basis for using a risk-free rate approach to value liabilities for withdrawal liability purposes only?
A Well, my understanding, again based on his report and deposition, is that since the withdrawing employer will pay a single sum of money and, therefore, doesn't take on the risk of those investments, that if the investments earn less than expected that he has effectively underfunded his portion of the plan.
Q And what is your reaction to that

Page 332

ARBITRATION
argument?
A My reaction to that argument is, yes, if in fact the plan doesn't achieve what we expect, then, sure, they're going to underfund the portion of plan.
Q Do you have a judgment as to whether Dr. Kra's theory is consistent with the requirement of a best estimate of anticipated future investment experience?
A Yes. I can't square it with that requirement.
Q And why is that?
A Because this Fund is investing fairly heavily in equities and real estate and is expected -- my expectation and certainly the plan actuaries' expectation, which is the most important one, is that the Fund will earn better than a risk-free rate.
Q Isn't it true, though, that if the Fund does not ultimately earn 7.5 percent, the withdrawing employer would end up paying less than what is necessary to fund its share?
A Yes.

ARBITRATION
Q But, nonetheless, you view that theory as being in conflict with actuary principle?
MR. RICHMAN: Objection.
ARBITRATOR IRVINGS: You want to rephrase it.
BY MR. MILLER:
Q Do you have an opinion on whether in the event of such an impact Dr. Kra's theory would be consistent with actuarial principles?
A Yes, I have an opinion. Yeah, the actuarial principle is, look, we expect 7 and a half percent. Maybe it will be higher than 7 and a half percent. Maybe it will be lower than 7 and a half. But on average we expect 7 and a half.
So if you are going to use 4 or 5, or 6, well, that can't be your best expectation because, yes, if it only earns 5, they will underfund their portion of the plan.
But if the plan earns 9, well, they're going to overfund their portion of

ARBITRATION
the plan.
And, you know, we don't know. It could be 5, it could be 9, but the best estimate is 7 and a half.
Q Are you familiar with the term "actuarial bias"?
A Yes.
Q And what is your understanding of actuarial bias?
A My understanding of actuarial bias is an assumption that would systemically either overprovide or overfund a liability or systemically underfund a liability as opposed to trying to get at your true, accurate best estimate.
Q Do you have an opinion as to whether if an actuary's best estimate of how a pool of assets is to perform is 7.5 percent, but assumes a different estimate for a withdrawing employer whose payments will go into that asset pool, the actuary's engaging in bias?
A Yes.
Q And what is your judgment?

ARBITRATION
A That would be a bias.
Q What if, as a consequence of a withdrawal, there would be a significant drop in the contributions of the Pension Fund with not a material prospect of future growth in participants, wouldn't that case justify perhaps a lower discount rate for the withdrawing employer?
A Not unless the trustees are going to, as in the case of, say, the Consolidated plan, going to change the investment mix of the fund.
If you are going to keep the investment mix where it was, then the change in the contribution -- the number of employers in the fund doesn't impact what your expectation is for the investment return of the fund in any material way.
Q In the context of a termination of a single-employer pension plan, what interest rates are used as the discount rate to value vested benefits?
A My understanding in a distressed termination of a single-employer plan, the

ARBITRATION
statute requires the use of PBGC rates for discount rates.
Q And do you have an opinion on what the policy view or rationale is for employing PBGC rates to discount liabilities in the case of a single-employer pension termination?
A Well, I don't know for certain, but certainly the idea in the case of a single plan termination is you are going to purchase annuities from an insurance company.
And so if you are going to purchase annuities from an insurance company, then PBGC, of course, is the exactly the type of rate that's required. And, of course, the statute specifically notes that in this case.
Q Do multiemployer pension funds ordinarily purchase annuities with a portion of their assets in the event of an employer's withdrawal?
A Certainly not ordinarily. And, in fact, I don't think I've ever seen that

ARBITRATION

occur.

Q In the materials that you reviewed in connection with your engagement by The New York Times, was there any evidence that the Pension Fund here was going to annuitize a portion of the benefits as a consequence of The New York Times withdrawal?

A I did not see any evidence of that sort and I didn't see any evidence of any prior annuity purchases, at least in the few years that I looked at.

Q And one final question for completeness.

Mr. French, what is your expert opinion regarding the actuarial assumptions used by the Pension Fund here to compute its unfunded vested benefits relating to The Times withdrawal?

A From withdrawal liability purposes that they are actuarial unreasonable in the aggregate.

MR. MILLER: Thank you.

No further questions.

ARBITRATION

MR. RICHMAN: Take a few minutes.

(A brief recess was taken.)

MR. RICHMAN: Let's go. Get back on the record.

ARBITRATOR IRVINGS: All set.

CROSS EXAMINATION BY MR. RICHMAN:

Q About how many multiemployer pension plans does Segal provide actuarial services to?

A I don't know the answer to that.

Q Let me show you an opinion. And I don't intend to introduce it in evidence. I just want to show you something.

MR. MILLER: Mr. Arbitrator, let me object right there.

We agreed to a set of exhibits. And the understanding was that those exhibits would be used for both cross-examination purposes and evidentiary purposes. And to use exhibits now for which we have not seen and have not had an opportunity to vet

ARBITRATION

and potentially prepare witness is prejudicial.

MR. RICHMAN: It's not prejudicial, first of all.

This is a cross. And as the Arbitrator ruled yesterday with respect to crosses, the exhibits themselves don't need to be placed on a witness list. I don't need to put this in as an exhibit. It is a decision of Arbitrator Jaffe where there is a discussion of the number of multiemployer pension plans which Segal represents. And I think what I would like to do is to ask the witness if he has any reason to believe that that is incorrect.

Now, I could bring in as a witness, if we can't get that information, somebody from Segal who has that information, but this is a whole lot easier.

MR. MILLER: There's going to be a witness from Segal immediately succeeding Mr. French. That question

ARBITRATION

can be asked. And even if she is not a definitive authority, she can express her judgment as somebody who has worked at Segal --

ARBITRATOR IRVINGS: Well, I think all of this is sort of much to do about a tangential fact.

But if my recollection is correct, in your memorandum you referenced was Ira's opinion.

MR. RICHMAN: I wrote about Ira's opinion. But this is certainly not a surprise. And even if it were a surprise, it doesn't matter.

ARBITRATOR IRVINGS: But asking him whether it strikes him as unreasonable, why don't you wait and just ask the Segal person because whether he has a guess as to whether Ira's figures -- I'm sure that Ira's figure is correct. And we all know Ira.

MR. RICHMAN: We all know Ira.

ARBITRATOR IRVINGS: But

ARBITRATION
without referencing Ira's, why don't you simply say, "Does the number ..."
MR. RICHMAN: All right. Okay. I'm not going to reference anything.
BY MR. RICHMAN:
Q But does it sound approximately correct to you that Segal Company represented in 2008 approximately 415 multiemployer pension plans?
A It doesn't strike me as impossible. It certainly seems reasonable -- reasonable possibility.
Q A reasonable possibility. Okay.
How many multiemployer pension plans were there in about 2008?
A I don't know exactly. I'm going to say, based on knowledge I have, roughly 1,500.
Q 1,500 or 1,200?
A I think it was closer to 1,500 but I didn't look it up for this because I didn't know it was going to come up.
Q And who are the other large firms that do -- who provide a significant amount

ARBITRATION
of actuarial services to -- I'm sorry. Withdraw that.
Which other firms, other than Segal, provide actuarial services to a substantial number of multiemployer pension plans?
A There's Kiron (ph.). There's Milliman. There's Buck. One time there was Mercer. There's a whole host of reasonable firms that provide services.
Q What about Horizon?
A And Horizon, yes. Thank you.
Q Is it your understanding that the Segal method is used by all of Segal's actuaries?
A I don't know about all of Segal's actuaries.
My understanding it is if not all, virtual -- the vast majority, let's say. At least the vast majority, how about that.
Q Okay.
Do you know whether actuaries at Milliman use a discount rate for withdrawal liability purposes that's different than the

ARBITRATION
interest assumption used for ongoing funding purposes?
A I don't know for certain. I'm sure that I have looked at some Milliman reports. I haven't looked at them recently, but my recollection was that they typically use the regular investment return assumption, but -- you know, Milliman is one of those firms where each office is sort of independently run, and it's certainly a possibility each office does something different.
Q Do you know whether Horizon uses a discount rate that's different from the investment assumption from time to time for some of its multiemployer plans?
A I know one that you told me it is. So you know the answer to that question.
I don't recall any others, but there could be.
Q For how long did the Segal Company use the Segal blend?
A My understanding dating some time back to the 1980s.
Q So I just want to see if we can pin

ARBITRATION
that down a little bit.
So the Multiemployer Act gets passed in 1981, right?
A That's my recollection. I wasn't working then, but ...
Q Wise guy.
And did the Segal Company use a different withdrawal liability method other than the Segal blend after the adoption of the MEPPA?
A I wouldn't know.
I don't know the history. I know they used it in the '80s.
Q It's been used for at least 25 years?
A I think that's a fair estimate.
Q As you indicated, when it was first used, it was used to lower withdrawal liability?
A I can't say it was used to lower withdrawal liability, but that was the impact.
Q Okay.
Do you have any reason to believe

Page 345

ARBITRATION
it was implemented at that time for the purpose of lowering withdrawal liability?
A I can't say for certain one way or the other what purposes.
Q Do you know what the rationale that Segal provides for using the Segal method is?
A I've seen the rationale in different places and explained it different times.
It seemed to be related to the possibility of actually purchasing annuities or going out and immunizing a portfolio.
But that explanation never made sense to me because it doesn't seem to be coupled with any actuality of doing that.
Q Okay. I just want to make sure I understand your answer.
Is it your understanding of the Segal method that it's premised on the fund actually going out and buying annuities?
A No. I'm saying it's premised on the concept that -- you know, why else would you use that methodology as your best

Page 346

ARBITRATION
estimate unless you thought you were either going to purchase annuities or that you were going to change your investment mix to be that return, you know, a portfolio that would give you that return.
Q You mentioned that you were on the Multiemployer Task Force, and that's of the American Academy of Actuaries?
A I think it was "Task Force" and then it changed to "Committee." If that's important. Of the American Academy of Actuaries, yes.
Q And that was beginning in 2008 and ending sometime --
A I believe early 2014.
Q And during that time period, did you as a committee or task force examine how withdrawal liability was calculated by various actuarial firms?
A I don't think we examined it, no. I believe it was discussed, not so much how each firm did it, but just the general concept of calculating withdrawal liability.
I have one distinct recollection of

Page 347

ARBITRATION
a phone meeting where it was discussed.
Q Okay.
Did this Task Force come out with any papers or directives or any suggestions to practicing actuaries on how withdrawal liability should be calculated?
A I don't remember anything on interest rates. I have a vague recollection that there was something about maybe the actual benefits that are determined, but --
Q But nothing on interest rates?
A Not that I can recall, no.
Q The members of this committee were aware, weren't they, that the Segal method was used almost exclusively by Segal as well as by some other actuaries to calculate the interest rate for withdrawal liability, correct?
A Correct. I think most people in the industry are aware of that, and there was at least one person from Segal on the committee.
Q Why didn't the committee express its opinion as to the impropriety of using

Page 348

ARBITRATION
the Segal method for calculating interest?
MR. MILLER: Objection. There's been no foundation that the committee was structured and designed to give opinions --
MR. RICHMAN: He said they examined withdrawal liability and how it was calculated and there was some focus on interest.
ARBITRATOR IRVINGS: That wasn't his testimony.
MR. RICHMAN: He did say --
ARBITRATOR IRVINGS: He said there was a discussion. He recalled a phone discussion on withdrawal liability.
THE WITNESS: Assumptions.
MR. RICHMAN: Okay.
BY MR. RICHMAN:
Q And what was the conclusion of that discussion?
A There was no conclusion to the discussions. These discussions were typically discussions and all conclusions

ARBITRATION

would be done in a formal statement, and there was no formal statement put out that I certainly would have been involved in and I certainly would have remembered it.

Q You've also done work for the PBGC, as I understand it, correct?

A Yes, I have.

Q On single or multiemployer side?

A Multiemployer side.

Q Do you know whether the PBGC has issued the regulations that are referenced in ERISA for calculating -- I'm sorry, for actuaries choosing assumptions?

A I'm going to assume that you mean the section of ERISA that instructs actuaries how to choose assumptions for withdrawal liability purposes?

Q I'm talking about 4213, right?

A I don't remember which section, the section numbers.

Q Okay. So 4213 says that "The corporation" -- which is referring to PBGC, right?

A Sounds right, yes.

ARBITRATION

Q -- "can prescribe by regulation actuarial assumptions which may be used by a plan actuary in determining the unfunded vested benefits of a plan for purposes of determining an employer's withdrawal liability."

A Yes.

Q You are familiar with that?

A Yes, I am.

Q And have they done so?

A Not to my knowledge.

Q Did you do any work with the PBGC with respect to the possibility of the PBGC issuing a regulation?

A No. PBGC had no interest in issuing a regulation of that type.

Q Why was that?

A Regulations issued by PBGC, the hurdles they have to go through are almost insurmountable.

Q The people at -- withdraw that.

When you were consulting with the PBGC, did you consult with anyone at the PBGC who you knew was aware that the Segal

ARBITRATION

method was being used by the Segal Company and other actuaries to calculate withdrawal liability?

A I can't say we specifically discussed it. Were they aware of it? Probably, but I would have to speculate. I don't recall any specific discussion or information I had that they know that, but I would tend to think they would.

Q Do you know Bruce Perlman at the PBGC?

A I know who he is.

Q So you don't know him?

A I don't know him personally.

Q You never worked with him?

A I did not. I think he's an attorney, not an actuary.

Q You get to answer the questions.

Do I understand your testimony correctly today that it is your opinion that the use of the Segal blend for consulting withdrawal liability is a violation of the law?

MR. MILLER: Objection.

ARBITRATION

MR. RICHMAN: I said "Do I understand" --

BY MR. RICHMAN:

Q Is that correct?

A I don't think I said that, those words.

Q Well, isn't it in your opinion a violation of the law?

A I can't give an opinion on the law. I can say I know what the law says. The law says it should be a best estimate of anticipated experience under the plan.

Those words are fairly simple, and in my mind the Segal method does not do that.

Q Okay.

But you're not taking a position on that?

A I'm not going to take a legal position, no.

Q And in your view, the Segal blend violates ASOP 27?

A In my view, the Segal blend does not conform with ASOP 27, correct.

ARBITRATION
Q So that would mean it violates it?
A Okay. If you want to say "violate," sure.
Q For how long is the Pension Fund here -- for how long has the Pension Fund here used Segal blend?
A I don't know. At least as far back as I looked, I think back to 2005.
Q Okay.
Do you have any reason to believe that the Segal blend was adopted by this Pension Fund for the purposes of increasing withdrawal liability?
A I have no reason to think one way or the other.
Q That's different from your experience with the Central States Teamsters?
A That is correct.
Q In the Segal blend that was used to calculate the Fund's withdrawal liability includes an investment assumption, the plan's ongoing funding investment assumption, correct?

ARBITRATION
A The regular ongoing investment assumption, the Segal valuation does show that number, correct.
Q And it's also used in the calculation of The Times' withdrawal liability?
A It is partially used in the calculation of The Times' withdrawal liability, yes.
ARBITRATOR IRVINGS: I'm sorry. Can we just go back to your first question on that.
MR. RICHMAN: Yes.
ARBITRATOR IRVINGS: I just missed the beginning of the question. Was there a specific rate that you mentioned?
MR. RICHMAN: No, no, I didn't.
What I'm asking, which Darren just answered, is to whether the investment assumption that is the plan's ongoing investment assumption, whether that was used as part of the Segal blend to calculate the withdrawal liability for

ARBITRATION
The New York Times.
BY MR. RICHMAN:
Q And I think your answer is yes?
A The answer is partially, yes.
Q Partially. It's one of --
A One of the parts of the calculation.
Q Two components of the calculation?
A Okay. Yes.
Q And the other component is?
A The PBGC rates.
Q Okay.
Focusing on the investment assumption component, for what year was the investment assumption used to do The Times' withdrawal liability calculation?
A I'm not sure I'm following your question. Sorry.
Q So the Fund uses the Segal blend, and the Segal blend used in part, the interest assumption that was reported by the actuary, correct?
A Yes.
Q Okay. And I'm asking you for what

ARBITRATION
year.
A For every year that I looked at it.
Q Okay. I'm just focusing on the year that the assumption would have been actually used to calculate the Segal blend.
A Well, remember, this Fund uses the presumptive method, so it goes back 20 years. So really, while it may first come into effect in the calculation May 31, 2009, that necessarily needs to go back 20 years. And so --
Q But if the interest assumption at that time of the Pension Fund was 6 percent --
A At what time?
Q At the March 31, 2009.
A Okay. If it was.
Q That's why I said if it was.
A Trying to follow you.
Q If it were and that was, in your words, the actuary's best estimate, would that be the component that would be used for the ongoing funding investment assumption as part of the Segal blend?

ARBITRATION
A Yes, I believe it would.
Q Okay. So it would be the March 31, 2009 interest assumption?
A For that one part of the calculation.
Now, remember, it goes back 20 years, so each -- it matters each and every year going back 20 years what that assumption is. It affects the calculation.
Q And I keep saying March.
A I'm sorry.
Q It's May 31st.
A Thank you.
Q But when you did your recalculation, what you focused on was the last year, did you not?
A The one I used in my expert report, yes.
Q So, and you testified here today that you think the 7 and a half percent that was used as the investment assumption for May 31, 2009 was a reasonable assumption, correct?
A Yes. And I do think that.

ARBITRATION
Q And would 7 percent have been a reasonable assumption, if the actuary chose that?
A Possibly.
Q How about 6 and a half percent?
A I don't know. It depends on the asset mix. Depends on a lot of things.
Q We know what the asset mix was.
A I wouldn't have picked a rate like that, and this actuary didn't pick a rate like that.
Q That's not the question.
The question is pretty simple.
A Okay.
Q And that is: Would 6 and a half percent have been, in your mind, a reasonable rate if the actuary had picked that as the investment assumption for May 31, 2009?
A I think it's a very -- I think it would be a low rate. Could it be reasonable? Maybe. It's a very hypothetical question.
Q Why is it a hypothetical question?

ARBITRATION
A Because they didn't.
Q Well, but you know all of the information that you'd need to determine whether it was an appropriate rate, you knew -- right? Yes?
A Yes.
MR. MILLER: But, objection. You asked him that question in connection with if the actuary had picked that assumption. Are you now asking him a different question?
MR. RICHMAN: We're beyond that. Stay with us.
BY MR. RICHMAN:
Q So you had the information --
A Yes.
Q -- to determine whether 6 and a half percent, that's May 31, 2009, was a reasonable interest rate for the Pension Fund, correct?
A Yes. I could figure that out.
Q Okay.
And as I understand it, in fact, you examined the portfolio of the Fund for

ARBITRATION
various years?
A Yes.
Q So let's take a look at the portfolio as -- for the Pension Fund as of May 31, 2009.
And we're going to Exhibit 7. We can do some math together or I can hand out something with the math already done, whatever you'd like to do.
What I'm focused on is Page 14, which is FUND-1580.
A 1580. Landscape page?
Q I don't know what a landscape is.
ARBITRATOR IRVINGS: Meaning it's printed this way.
MR. RICHMAN: Oh, really.
BY MR. RICHMAN:
Q Now, you testified about this page before previously?
A Not this page I don't think. It was a similar page --
Q In a different report?
A In the Fund's audited financial statements is what I testified about earlier

Page 361

ARBITRATION

today, if that's what you mean.

Q Is this not in the Fund's audited financial statement.

Let's look at 1564.

A Maybe it is. Yes, but it's a different page.

Q If you look at Page 1564, it is the financial statement, correct?

A Yes, it would appear to be. Yes.

Q Do you have any reason to believe it's not?

A I have no reason to believe it's not. So, yes, I agree with you it appears to be.

It's in the supplemental information. I mean, I don't have the bound report, but I think typically this is.

MR. RICHMAN: I mean, is there some question that this is not really the report, Evan?

MR. MILLER: I don't know what -- do you know what a supplemental information is on? Do you know whether supplemental

Page 362

ARBITRATION

information is part of the report?

THE WITNESS: It often is. I just don't remember if it is in this specific case.

BY MR. RICHMAN:

Q You just testified previously that you didn't use this page, but you used a similar landscape page --

A No. Similar portrait page.

Q Portrait page, with this information?

MR. MILLER: But it was not part of the supplemental information. The only issue is, is supplemental information part of the report.

MR. RICHMAN: We can brief that. Okay?

ARBITRATOR IRVINGS: Go ahead.

MR. RICHMAN: Or we can wait and call in an auditor.

BY MR. RICHMAN:

Q So let's look at the Fund's investments as of May 31, 2009.

And I'm going to hand this to your

Page 363

ARBITRATION

counsel to see if he's okay with this because what we did was add this up. Or we could try out our math skills.

MR. MILLER: What is the purpose of this?

MR. RICHMAN: I want to show the asset allocation.

MR. MILLER: Okay. This is essentially a demonstrative exhibit, correct?

MR. RICHMAN: It's not an exhibit.

MR. MILLER: And we had agreed on a deadline for use of demonstratives.

MR. RICHMAN: It's not a demonstrative. I'm not planning to use it as an exhibit. But if you don't want to use it, we can all add it up together.

MR. MILLER: It is a demonstrative exhibit.

MR. RICHMAN: That's fine. We can all add it up together and we can

Page 364

ARBITRATION

be here for four days or five days.

THE WITNESS: I don't have a calculator with me.

BY MR. RICHMAN:

Q You can do math --

A What math do you want me to do?

Q I want you to add up certain numbers.

A Let me turn on my phone.

MR. GARFIELD: We have an HP12C you can borrow.

THE WITNESS: Thank you.

If we can use rounded numbers, make it easier.

MR. RICHMAN: Sure.

BY MR. RICHMAN:

Q So Collective Short-term Investment Fund.

Do you know what type of fund that is?

A That is a fixed income fund of a sort.

Q So what I'm going to be doing is adding up fixed income or bond funds.

ARBITRATION
And one category equity, in another category real estate, and a third category.
A Okay.
Q If you want to put that on the side of investment fund -- bond fund?
A Okay.
Q Let's go down to the LongView Core Bond Index Fund.
A Okay.
Q That's also a bond fund?
A Yes. That certainly sounds like it.
Q And let's also take the Western Asset Core Bond Fund.
A Okay.
Q Can you add those three up for us?
A Well, we got 47,200,000.
Q Okay. Fair enough.
Now, let's add up the Russell 1000 Fund.
A The Russell 1000 Fund. So we'll call it 9.6.
Q Okay. And this would be an equity fund?

ARBITRATION
A That would be an equity fund, I believe.
Q And let's add up the Intech Risk Managed Large Cap Growth Fund.
A So we are going to add up the Russell 1000, which is 9.6 plus.
Q The Intech Risk Managed Large Cap Growth Fund. And the LongView 1500 Total Market Index Fund.
THE WITNESS: I'm going to use my calculator because that one confounds me.
A Okay. Let's try this again.
Q So we got those three together.
A Russell 1000, that's 9.6.
And the next one was?
Q LongView 1500.
A Okay. 26.0. Okay.
Q And then the Intech fund.
A 11.9. Okay.
So we have 47.5 million.
Q And the last fund is a real estate fund?
A Yes. 6.2 million.

ARBITRATION
Q And so would it be accurate to say that the Fund was roughly 47 percent invested in equity, 47 percent invested in bonds and 6 percent invested in real estate?
A As of this point in time, yes.
Q Now, on a scale from -- in terms of aggressiveness, how would you consider this Fund to be invested as of this time?
A As of this time, based on these numbers -- and, by the way, these numbers don't look familiar to me because I did do this exact thing in my report. And I remember some are higher equity numbers.
But assuming these numbers aren't missing something that I'm not seeing right here, this would be a fairly typical fund, maybe slightly less aggressive than a typical fund.
Q Okay. And for this asset mix, what would you consider to be a reasonable investment assumption?
MR. MILLER: Lack of foundation. There's been no evidence that he engaged in any of the

ARBITRATION
actuarial methods to calculate an investment return assumption in connection with this portfolio.
Mr. Richman is now asking him for an invest return assumption decision to be made.
His testimony earlier was that what he did was he made a judgment about the investment return assumption that was made by the plan's actuary here, and he further testified that he thought that that actuary had engaged in a technical method called the building block method.
I mean, Mr. Richman can ask him if he engaged in any building block method exercise.
There's no foundation for him to be able to render a judgment on what the investment return assumption should be, based on rough figures of asset classes, without at least knowing more detail of those asset classes and applying the scriptures of the ASOP 27.
ARBITRATOR IRVINGS: What's

ARBITRATION

your question?

BY MR. RICHMAN:

Q My question is: Given this asset mix -- and this is the May 31, 2009 asset mix.

A Based on this page?

Q Yes.

Do you have any reason to believe these numbers are wrong?

A Different pages of reports don't show the full asset values necessarily. There's certain things that may be missing from this page that are on some other page.

Q What would be missing from this page that's on some other page?

A Some kind of accrual number, some kind of other fund besides -- these may be just the interest in common collected funds -- I don't know offhand because I haven't studied this page before.

I studied the other page where I did look at the numbers which I show in my report, which would be much easier to look at my report and just see based on that what

ARBITRATION

kind of return I would expect, rather than looking at one point in time from a part of an exhibit that I'm not familiar with.

Q But why wouldn't you have picked this page to review given the fact that this would be the interest -- this would be for the interest assumption that would have been the ongoing funding assumption at that point in time?

A I picked a different page.

MR. MILLER: Objection. There's no evidence --

A I think there's a better --

ARBITRATOR IRVINGS: Wait. When counsel objects, you've got to let him speak.

THE WITNESS: I'm sorry.

MR. MILLER: Lack of foundation.

There's no evidence that the enrolled actuary in this case focused on these investments and the description of these investments exclusively in developing our 7.5 percent best estimate.

ARBITRATION

MR. RICHMAN: Look, there is an allocation mix at the time of May 31, 2009. This witness has already testified to in cross that this would be the investment assumption that would be used as a component in the Segal method.

And what I'm simply trying to find out is whether this component used in the Segal method is an appropriate number.

ARBITRATOR IRVINGS: And did he not already testify that the 7.5 percent he found to be in the aggregate a reasonable interest rate assumption?

MR. RICHMAN: Right. And I'm going to debunk that, because what I'm going to show is that it is at most on the very high end of a reasonable assumption and that when you take into account the asset mix at this time, which is the -- which is what the number -- which was the asset allocation that existed at the

ARBITRATION

time for the number that was selected for the investment assumption, that the range at least is significant -- that 7.5 percent is at the high end of the range. And the range goes significantly lower than 7.5 percent.

That's important, very important to understand all of Mr. French's testimony, because it is our view that use of the Segal method or not, it didn't matter because the number when you put together the calculation that it was, as Mr. French testified in his deposition, that the same -- that the vested liability number could be reached by using an interest assumption of somewhere between 6 and a quarter and 6.5 percent.

And my point here is very simple: That when you look at the investment portfolio and the allocation at May 31, 2009, that 6.5 is certainly within the realm of reason under actuarial principles.

MR. MILLER: May I be heard?

ARBITRATION

To the extent that Mr. Richman is attacking the 7.5 percent, he is, ironically, attacking the best estimate of his client's own actuary.

That's point number one.

Point number two is that Mr. French testified this morning that there is a technical and elaborate process that actuaries go through as identified in that ASOP. He mentioned specifically this building block method to determine a best estimate assumption.

Mr. Richman can ask, I have no issue with his asking Mr. French if he engaged in a building block method analysis to essentially audit the 7.5 percent assumption.

But Mr. French is not equipped, by his own testimony in the course of this examination, to calculate his own best estimate assumption, particularly in light of what he just testified about the potential inadequacies and limitations of the information on that page.

ARBITRATION

ARBITRATOR IRVINGS: Okay. Let me try and understand.

Did you as part of your report calculate an interest rate investment assumption based on the asset mix, the actual asset mix?

THE WITNESS: No. In part of my report, I showed this kind of calculation based upon a much bigger range of numbers and a much bigger number of years.

I looked at the asset mix, and based on that, and my knowledge of other calculations I've done for funds of a similar-type nature, determined that I believe 7 and a half percent was a reasonable best estimate.

And I know from my own experience on funds of this sort I've used that type of a rate.

ARBITRATOR IRVINGS: So what are you asking him to do now?

MR. RICHMAN: Well, what I'm asking him to do is based on the

ARBITRATION

asset mix that existed at May 31, 2009 -- where I'm going with this is I want to know the range.

Now, he's already said, when I said 7 and a half: Could have been 7, could it have been 6 and a half, that would be on the low end.

But he seems to be focused on a different asset mix than the asset mix that existed on the critical date which is May 31, 2009.

And we can brief that issue about whether that's the critical data or not. That's not an actuarial opinion. But in our view, that's the critical date because that's the date in which the actuaries gotta look at the asset allocation and see what they're going to come up with, with an investment assumption.

MR. MILLER: We have an actuary who apparently undertook a detailed analysis in 2009 and made a conclusion about what is the best

ARBITRATION

estimate of investment performance then, and that was repeated subsequently each year.

Mr. Richman will have an opportunity to examine that actuary, the actuary for his client, and is certainly free to ask that actuary what the range was within the complex calculations she may have made and perhaps ask her why she did not pick 7.5 percent or did pick 7.5 percent as opposed to a different number.

But Mr. French is not equipped at this juncture to make projections about where the range is of estimates for either best estimate or the particular best estimate for this portfolio.

MR. RICHMAN: Let me go back to the deposition.

ARBITRATOR IRVINGS: Sure.

MR. RICHMAN: And I'm going to look at Mr. French's deposition on December 8, 2014.

And there was a series of questions

ARBITRATION

that I was asking.

I can read the whole thing or let me just pick a ...

So I'm going to pick up on Page 82 and Line 22.

"Question: That best estimate is Segal's best estimate, correct? And that's the 7 and a half percent."

And the answer was: "That is Segal's best estimate, correct."

"Question: Is that also your best estimate?"

Mr. Miller objects to the form.

And the answer is: "My best estimate is not what's relevant here but it would certainly -- certainly that is a reasonable assumption that would not be unusual for me to use as a best estimate assumption.

"Okay. Would 6 and a half also be a reasonable assumption?

"Objection to the form."

And I say, "Answer the question."

"It could be in certain situations,

ARBITRATION

not in this one.

"Why not in this one?

"Because the actuaries already certified that 7 and a half is their return. And this is a very aggressively invested fund. It's a big fund. It's professionally managed. That would be a low rate."

ARBITRATOR IRVINGS: Okay.

MR. RICHMAN: And so my point here is he made an assumption based on a portfolio, and he testified today, "7.5 percent is very reasonable. That return is what you would expect."

That's what he testified to today.

ARBITRATOR IRVINGS: Right.

MR. RICHMAN: And so what I'm asking him is 7 and a half percent really, when I'm crossing him, is 7 and a half really a reasonable number? And how far down can you go down in that number.

MR. MILLER: But that's not responsive to our argument.

ARBITRATION

Our argument is that the withdrawal liability investment return assumption was not the same as the funding policy assumption.

If they believed that their own actuary's funding policy assumption was wrong, they can ask their own actuary when she takes the stand.

But this is not relevant essentially and at bottom to our contention that it's precisely because the two investment return assumptions were not the same that the assumption used for calculating the withdrawal liability is wrong.

ARBITRATOR IRVINGS: And I fully understand your argument.

He apparently has a somewhat different argument.

And opinions have been offered that this was a reasonable assumption.

You can test that examination.

However, I'm not sure that a calculation based only on this page is --

ARBITRATION

MR. RICHMAN: I'm happy to brief that.

ARBITRATOR IRVINGS: Okay.

MR. RICHMAN: I mean, I'm sure Evan will take a contrary view. We think that's the accurate way to look at it.

The May 31, 2009 asset allocation.

We don't have any reason to believe this is not the asset allocation as of May 31, 2009.

ARBITRATOR IRVINGS: And you are free to ask him what asset allocation he was judging.

MR. RICHMAN: Which he was judging.

ARBITRATOR IRVINGS: When he made his opinion that the 7.5 was a reasonable figure for the investment rate of return.

MR. RICHMAN: I'm happy to ask him that but I'd also like to ask him, based on what he's already said, May 31, 2009 would be the right time

ARBITRATION

period to ask him about what it would be based on this allocation.

ARBITRATOR IRVINGS: And you can certainly ask him whether that's a determination he can make simply from this data. That's fine.

You know, I clearly have evidence, his statement that he can't, but you are free to ask the witness.

MR. RICHMAN: Okay.

BY MR. RICHMAN:

Q So you testified on direct that 7 and a half percent is very reasonable and that the return is what you would expect.

Do you remember that?

A Yes.

Q And you base that on looking at what?

A If you look in my expert report, I went through a fairly detailed analysis of how the Fund has been invested over the past few years. And I would not look at just one date at one particular moment in time.

I mean, funds often reallocate

ARBITRATION

assets at different points particularly at a year end, so I wouldn't look at this just one point in time.

And my recollection from my report, this is about the lowest percentage. In fact, this looks lower than anything I recall from my report, but it was substantially higher than this in terms of equities at different points in time over the period that I looked at.

And even this return, even this portfolio has a fair amount of risk in it, so 7 and a half percent is not an unreasonable return even for these numbers that we look at here.

But I would look at something considerably larger than that and based on higher percentage. Seven and a half percent is absolutely a reasonable assumption.

Q And so you just testified, "And even this return, even this portfolio has a fair amount of risk on it, so 7 and a half is not an unreasonable return here even for these numbers that we look at here."

ARBITRATION

So you are apparently able to do this calculation as we sit here.

A No. That's not what I said.

I said if this was the portfolio the whole time, even that's not unreasonable. It may or may not be the return I would come up for this, but it is not an unreasonable one.

Q Given this portfolio, what do you view as the range of reasonable numbers?

A I don't have one. I don't have one. And I can't do that on the fly right here.

Q But on the fly right here, you can conclude that 7 and a half percent was --

MR. MILLER: Not unreasonable.

A Not unreasonable.

Q -- not unreasonable.

MR. RICHMAN: Excuse me. You can't answer his questions.

MR. MILLER: I was lodging an objection.

ARBITRATOR IRVINGS: What's the objection?

ARBITRATION

MR. MILLER: The objection is it mischaracterizes his testimony. His testimony said that in connection with the work he did for his expert report, he made conclusions about whether 7.5 percent --

MR. RICHMAN: I just read his testimony. How did I mischaracterize it? He just -- I just simply read his testimony.

ARBITRATOR IRVINGS: Okay. Let's move on.

What's the next question, please.

BY MR. RICHMAN:

Q Okay. So based on this allocation of assets, are you able to opine as to whether 6 and a half percent was in the range of reason?

A Which allocation risk?

Q The allocation we've been fighting over for the last --

A Which may or may not be accurate.

Q Thank you for that. That's helpful.

ARBITRATION

A Well, because I'm not sure it does -- you know, I didn't look at this page.

Q I'm not asking you -- I'm asking you based on the numbers on that page.

A Is it possible? I don't know. Maybe it is possible. But I'm not going to sit here today and try to go through these numbers and give you an exact range of where I think would be a reasonable assumption. It's just not something you do on the fly here.

Q Okay.

You indicated that you were the actuary for the CRF, correct?

A I was the actuary for the CRF, yes.

Q What interest assumption did you use there?

A I used a 7.5 percent interest assumption net of all plan expenses, if I recall correctly.

Q With respect to ASOP 27, what is the best estimate range?

A ASOP 27, I believe in section -- I

ARBITRATION

don't remember the exact section number -- talks about a range of numbers more likely than not for the results to come in at.

Q Let's take a look. I don't want you to do this blindly.

Let's look at Exhibit 10.

MR. MILLER: White binder.

A Exhibit 10 in the white binder. Okay.

Q If you take a look on the second page of ASOP 27, it says Best Estimate Range. 2.1?

A Yes.

Q And what is your understanding of what the -- you see the phrase "narrowest range"?

A Yes.

Q What is your understanding of what that means?

A My understanding is, my view on that is that it's a very narrow range depending on certain parameters that you might pick.

I don't think it is very specific

ARBITRATION

about exactly what it means, but I think the words "narrowest range" suggest exactly what they say, a narrow range.

But there's no backup on this that I'm aware of that gives guidance from the Triple A as to how exactly that would be determined.

Q Are you familiar with something called the Pension Practice Council Practice Note, May 2001, Selecting and Documenting Investment Return Assumptions?

A May 2001?

Q Correct.

A I don't remember that, no.

MR. RICHMAN: I would like to show it to the witness.

ARBITRATOR IRVINGS: First show it to counsel.

MR. MILLER: We've not seen this document, so, Mr. Arbitrator, we object to use of this document in the cross-examination. Obviously, this is the first time we've seen it. We have not been advised that it would

ARBITRATION

be used. And there's been no laying of a proper foundation for its use.

We don't know what the Pension Practice Council is, whether actuaries are required to follow the practices, and what the importance of this note -- whether the Council practice notes are held in regard.

And, indeed, the date of this is May 2001 which is significant number of years before the relevant time period or periods as it relates to selection of a best estimate return assumption and, indeed, before the adoption of the ASOP that was in effect when the calculation of withdrawal liability was made.

And for all those reasons, we don't think it's probative and potentially prejudicial.

MR. RICHMAN: I just want to know if you are aware of it. I would just like to show it to him to see if he's aware of it.

ARBITRATOR IRVINGS: You can

ARBITRATION
ask the foundation questions, which
were all appropriately raised.
MR. RICHMAN: Okay.
BY MR. RICHMAN:
Q So do you know what the American Academy of Actuaries is?
A Yes, I do.
Q And you are a member or you were a member?
A I am a member.
Q You are still a member?
A Yes, I am.
Q And do you know what the Pension Practice Council of the American Academy of Actuaries is?
A I don't think I was even an academy member back at that time. And I don't remember this particular note. And that's something that I think --
Q You are jumping to a conclusion. If you can just answer the question.
A I'm sorry. Sure.
Q Do you know what the Pension Practice Council of the American Academy of

ARBITRATION
Actuaries is?
A I'm not familiar with that phrase.
Q And I think you've already answered you're not familiar with this note either.
A Correct.
Q Thank you.
In your view, could the narrowest range be a range as broad as from the 25th to the 75th percentile in terms of investment returns?
A I've heard people using that as a possibility of interpreting this, yes.
Q Do you agree with that?
A I think that's way too broad a range, especially when you consider -- you know, actuaries are fairly conservative bunch. And these standards in particular tend to be very evolutionary rather than revolutionary.
And when you look at the next version of this in terms of where they went, the range was eliminated entirely. The idea you go from a very ride range to no range at all strikes me as very odd and not typical

ARBITRATION
of the way actuaries operate.
Q Now, during your deposition, I asked you as to what the interest rate -- what interest rate would produce the same result for calculating the Segal blend that was used for The New York Times' withdrawal liability.
Do you recall that?
A Yes.
Q And you recall what your answer was?
A Yes. I said that I hadn't done an actual calculation. I had done a, metaphorically, back-of-the-envelope calculation more or less in my head and came up with something probably 6 and a quarter, 6 and a half.
Q Do you have any reason to believe that that estimate is incorrect?
A Other than the fact that I hadn't done a detailed calculation, no, but it could be. It results from the fact it's not a true calculation. Of course, it could be wrong.

ARBITRATION
Q I'm going to want to show you -- let's go to Exhibit 12.
Do you have it?
A I do.
Q Can you tell me what this is?
A It appears to be the 2012 Form 5500 for the Consolidated Retirement Fund.
Q And I want to direct your attention to Page 23. Actually, it's Page 23 of the financial statements.
A Okay.
Q Do you see that?
A It's the one entitled Schedule H?
Q Yes.
A Yes, I see that.
Q Do you know what that is?
ARBITRATOR IRVINGS: One moment, please.
A Schedule H in 5500?
Q Yes.
A I believe it's details regarding the investments of the fund at December 31, 2012.
Q You were the enrolled actuary for

ARBITRATION
this fund as of December 31, 2012?
A I believe I was, but maybe I can just check.
Q Sure. Go ahead.
A Yes, I signed the Schedule MB.
Q What was the interest assumption you used for the ongoing funding of this plan?
A That would be shown on 6(b) of Page 3 of the Schedule MB and that shows 7.5 percent.
Q And that's the same interest assumption that Segal actuary used for the portfolio for the NMDU plan, correct?
A Correct. Although there is a difference because Segal uses an expense load on top of that. This rate is net of all plan expenses.
So this 7.5 percent rate is truly a higher rate and closer to 8 percent.
If you are comparing apples and apples.
Q And so you think it's about 8 percent if you put --

ARBITRATION
A I don't remember. I know it's higher than 7.5.
Q But you don't remember?
A I don't, no.
Q You would agree, would you not, that the CRF plan was invested much more aggressively than the Pension Fund in this case?
A I don't know that offhand. It might have been. We'd have to look through --
Q Weren't you the actuary for the plan for a period of years?
A Yeah, couple years ago.
Do you remember everything you did the last five years?
Q Pretty much.
A Yes, I was. No, I don't remember the details.
It might well have been, but I'm not going to testify to that without reviewing it.
Q And what was the interest assumption that you were using for the

ARBITRATION
discount rate for calculating withdrawal liability?
A On this particular fund?
Q In this particular fund.
A I do believe -- let's see, this was 2012, so this was after the point where we talked about earlier today.
So I do believe I was using a lower withdrawal liability interest rate assumption.
Q Let's turn to an unnumbered page. But it's a Schedule MB, Line 11, Addendum, it appears.
ARBITRATOR IRVINGS: I'm sorry? What document are you looking at?
MR. RICHMAN: Same document.
MR. MILLER: It's the page that follows Page 24 on the Supplemental Schedule.
A The first page of Schedule MB.
Q No. It's the page after what we were just looking at, the asset allocation.
A There may be more than one version.
Q There is more than one version.

ARBITRATION
There is a financial report.
MR. MILLER: Here it is. Talks about interest rates.
A Okay.
Q And you see the first paragraph?
A Yes, I do.
Q And so the interest rate used to value vested liability for purpose of withdrawal liability was changed to 6 percent from 7 and a half percent.
A Yes, I see that.
Q And you decided to make that change, correct?
A Yes.
Q And while you were still at Buck, was the rate lowered to 5.5 percent?
A It might have been. I don't remember.
Q But you were not the enrolled actuary at the time it was lowered to 5.5 percent?
A This was, I think, the last year that I was the signing actuary on the plan.
Q And who took over your position as

ARBITRATION

the enrolled actuary for the CRF?

A At Buck, I think it was Robin Zlotowitz.

Q Did you discuss with Ms. Zlotowitz the changing of the interest rate used to value liability for withdrawal liability purposes from 6 to 5.5 percent?

A I don't remember.

Q And now, as I understood your testimony on direct, you changed this because the trustees had indicated to you that there might be a change in the investment allocation, correct?

A What I indicated was that if UNITE HERE and another large employer were to withdraw from the fund, the trustees indicated that they would be changing the investment mix of the fund because they no longer had the deep pockets and were concerned about their own benefit security.

Q So I think your testimony before on direct was that the trustees were seriously considering changing the asset allocation; is that correct?

ARBITRATION

A Yes. And we had a discussion about it that if there were major employers leaving the fund, they were concerned, it was their own benefits here --

Q But you changed it before there was actually a major employer leaving the fund.

A Yes, an anticipation that if, if, an employer -- they are only talking about changing the investment mix if there was a major withdrawal.

If there was not a major withdraw, they were not going to change their investment portfolio.

So for regular funding where that is not anticipated, we did not change the investment return assumption for that purpose.

For withdrawal liability which would have necessarily been contingent on a withdrawal incurring, in anticipation if that situation occurred, then the funding rate, the ongoing funding rate would be reduced later.

Q But I actually asked you a simple

ARBITRATION

question.

A I'm sorry. I must have missed it.

Q And the simple question is that you changed the rate before there was an actual change in the asset allocation?

A Correct.

Q Thank you.

And with whom did you have this discussion?

A I believe -- it was quite a while ago, but I believe it was with three of the trustees at a meeting with Amalgamated Bank and could have been others, but I have one particular discussion that comes to mind.

Q Did you ever have a discussion about this or hear a discussion about this with the investment consultant being present?

A No. He wouldn't have been involved in these conversations.

Q He wouldn't have been involved in a conversation about a change of the asset allocation?

A He wasn't at the meeting. And, in

ARBITRATION

fact, the actual change never occurred. There was never a withdrawal that would have brought him into this to actually talk about making changes to the investment allocation.

Q Okay. And was there an act, a decision by the board of trustees of the CRF to change the asset allocation of the fund?

A No. Like I said, it was a: If this occurs, this is what we are very likely going to do. This is our anticipation. But if it doesn't occur, we are not going to change it.

Q How many trustees were there on the CRF?

A Oh, I'm going to say ten, maybe more than ten.

Q And you had this discussion with three of them?

A Three very key ones. The key decision-makers.

Q Okay. How many discussions were there?

A At least one. There may have been others but at least one.

ARBITRATION

Q How long did this discussion take place?

A I don't remember. Ten minutes. I don't know.

Q So on the basis of that discussion, you determined that 6 percent would be the appropriate rate for withdrawal liability purposes?

A I determined a rate. I set it down in a memo to the trustees saying, look, this is what you've told me. Based on this information, this is how I'm changing the investment return assumption for withdrawal liability purposes, assuming this many employers withdraw and they change the mix to a fixed-income portfolio on a bigger portion of the fund. And this is how I came up with the number.

So it wasn't just a conversation. I put it back in writing to the trustees, this is what you told me, this is why I did it.

Q Okay. I understand you did a memo.

A Yes.

ARBITRATION

Q And you put it back to the trustees.

Did the trustees ever tell you what the investment mix would be if there were a withdrawal?

A We didn't get exact percentages or anything of that sort. It was sort of we were going to go to a very conservative fixed-income type on a bigger portion of the fund assets.

Q And so they told you that that would actually happen?

A That was their anticipation.

Q What does that mean, that was their anticipation?

A That's what they believed they would do if this event occurred.

Q So they told you that that's what they believed that they would do. And on the basis of that, before anything happened, you decided to change the interest rate for calculating withdrawal liability?

ARBITRATOR IRVINGS: I think, Ron ... Let's move on.

ARBITRATION

MR. RICHMAN: Okay.

BY MR. RICHMAN:

Q Did the employer that was considering withdrawing, that was whom?

A UNITE HERE. All capital letters. UNITE HERE.

Q And did they actually withdraw?

A Not while I was working on the account.

Q Okay. And while -- when was it that you last stopped working on the account?

A I think it was around July of 2013, somewhere in that area.

Q And in July of 2013, was there still a threat that UNITE HERE was going to withdraw from the Fund?

A Very likely. I don't know, but they had never withdrawn their threat. Let's put it that way.

Q Okay.

So in your mind that was -- their threat to withdraw from the fund still existed in July of 2013?

ARBITRATION

A Very possibly, but, remember, I wasn't setting the assumptions at that point. When I was setting the assumptions in 2012, it was certainly out there.

Q And did you ever have a conversation with anybody from Buck that if this withdrawal didn't occur that you needed to reset the assumption?

A I don't remember.

But, remember, if no one withdraws, the withdrawal liability assumption is essentially academic.

Q But it still would have been in violation of ASOP 27, would it not?

A Not if you have a logical reason to do it in that it's going to follow through and to be a change in the investment, it's perfectly consistent with ASOP 27.

Q And what if one of the smaller employers withdrew?

A Well, they didn't happen to, to the best of my knowledge.

Q But if they did, they would have been assessed with withdrawal liability

ARBITRATION

using that assumption correct?
A Correct. But just like any other assumption, just because it didn't happen, doesn't mean it was wrong. Doesn't mean it was a wrong assumption.
Q Let's go back to ASOP 27 which is Exhibit 10.
A Okay.
Q Let's look at 3.6 on Page 5.
A Yes, I have it.
Q Now, as I understood -- and correct me if I'm wrong -- that you thought pursuant to 3.6 that there were two exceptions for the discount rate being selected that is different than the investment return assumption?
A There are two exceptions shown there, yes.
Q And in your reading of 3.6, is it your view that 3.6 is intended to have only two exceptions?
A 3.6 can't necessarily be read entirely on its own. This whole statement works together and there are other sections

ARBITRATION

where they specify where it wouldn't apply.
But when you read these sections together, it's clear that the exceptions are two categories: One is where, by government or accounting regulation, you are required to use something else. Or in the case where the plan has no assets, obviously you can't use the actual portfolio because there is not one.
There's nothing in here to suggest there would be some other -- there's no other example shown of some other reason why you would do something other than the investment return.
And the examples shown here show very clearly why you wouldn't in those examples.
Q Can you tell me where else in this ASOP 27 that supports your view that there are only two exceptions to the statement that generally the appropriate discount rate is the same as the investment assumption?
A Well, there's that line. There's the section in the front --

ARBITRATION

Q Let's go to that.
A That is Page 1 under Section 1.2.
Q All right.
A The third paragraph on that page, last paragraph on Page 1, "This standard does not apply to the selection of an assumption where the actuary is precluded from exercising independent judgment by applicable law, regulation or other binding authority, i.e., when a specific assumption is mandated or when only a specified range of assumptions is deemed to be acceptable."
Then it goes on to show an example.
Q Isn't that simply saying that ASOP 27 doesn't apply?
A Meaning in the same sense.
The same example they're showing for ASOP 27 is essentially that same type of thing. Yes, it is paraphrasing to some extent.
It is paraphrasing this entire ASOP 27, but you have to read this thing as an actuary and in terms of how it was intended. And the logic of it is, of

ARBITRATION

course, if you are required by an outside standard, whether it be accounting standard or a government entity, to do something else, well, of course you should do something else.
And if you don't have a pool of assets to use as your basis, well, of course you have to do so something else.
But there's no suggestion here of any other reason why you would do something else when you need a best estimate of anticipated experience under the plan.
Q And what do you think the phrase "anticipated experience under the plan" means?
A What could it mean besides --
Q I'm just asking you what you think it means.
A It means the investment return of the underlying assets.
Q Okay. That's what you think it means?
A Right. What else --
Q I can't answer questions.

ARBITRATION

A I'm just saying, there is nothing else that it could mean.

Q So you can't imagine anything else that it could mean?

A Not if you are trying to determine the experience under the plan.

I just don't want you to parse one piece out that doesn't belong with the other. That's all.

Q Take a look at 3.3 of the ASOP 27. That's on Page 4.

A Yup.

Q And it talks about the consideration the actuary should consider when "identifying which types of economic assumptions to use for a specific measurement and when selecting those economic assumptions that will be used."

And the first one is the purpose and nature of the measurement.

Can you tell me how that works with 3.6?

A Yeah. They're saying depending on the purpose and nature, you might use

ARBITRATION

something different.

But, remember, the purpose and nature of a withdrawal liability calculation is essentially no different than the purpose and nature of the regular minimum funding requirements. They are essentially looking at the present value of basically the same benefits. Basically, all of them are going to be paid out of the same trust fund. They are going to be vested under one asset policy.

So, and this doesn't give you a rationale for using a different rate for withdrawal liability versus minimum funding because they aren't different.

Q So they are not different. So isn't withdrawal liability only assessed against an employer that withdraws?

A Yes.

Q And that's not different than the employer continuing to participate in the pension fund?

A It's different only in a sense of who is paying the money and how you are

ARBITRATION

characterizing them.

Either way, they are going into the minimum funding standard account. Either way, they're going into one pool of assets. Either way, those assets are going to pay one set of benefits under the plan.

There's not one pool over here for withdrawal liability payments and another pool over here for regular funding payments. They all determine minimum funding.

Q But the withdrawal liability's actually fixed at the time that the employer withdraws from a fund, correct?

A Yes. But, again, it doesn't change the dollars coming in and where they go.

Q I just would wish you would answer the question.

ARBITRATOR IRVINGS: Yeah, it's going to be faster if you just --

MR. RICHMAN: Or we'll be here three days.

MR. MILLER: Speaking of that, it is 1:00 --

MR. RICHMAN: Not a good time

ARBITRATION

for a break, but I'll look for a break hopefully soon. And if I could be provided some assistance, we'll get there.

BY MR. RICHMAN:

Q So what I just asked you is the withdrawal liability is actually fixed for an employer who withdraws as of a certain date, correct?

A Correct.

Q And the withdrawal liability is paid over a certain period of time?

A Correct.

Q And that calculation is done under the statute for how long a period of time?

A For up to 20.

Q Up to 20 years.

So they are not in the pension plan to the extent that they have any risk associated with the performance of the investment portfolio, correct?

A That's correct.

MR. RICHMAN: Tell you what. Maybe this is a good time to take a

ARBITRATION
break. I'm not finished. But let's eat lunch.
(A luncheon recess was taken at 1:05 p.m. through 1:54 p.m.)
MR. MILLER: Back on the record.
CONTINUED CROSS EXAMINATION BY MR. RICHMAN:
Q We have had testimony previously in this arbitration, in particular from a New York Times witness, particularly about the decline in the industry in which the Fund's participants are employed.
And he had also indicated that he did not expect that that decline was going to be reversed.
And so assuming he is correct in his judgment, how would that affect the pension plan, this pension plan in this suit?
A How would that affect this pension plan?
Q Yes.
A Well, there would be lower contributions coming in presumably, unless

ARBITRATION
rates were correspondingly increased.
It would slightly reduce the ongoing obligations to the Fund versus what would otherwise would happen.
And there would be less contributions and assets. There would also be probably less liabilities in the future.
Q And the plan would become more mature?
A I think you would often use the word "more mature." I think the retiree or inactive population relative to the active population would probably increase, and that is often called a more mature plan.
Q What are the facts of having a more mature plan?
A There's less contributions coming in relative to the size of the assets typically. And at some point the plan would have a somewhat shorter time horizon.
Q And what does that mean, have a shorter time horizon?
A Less further-out liabilities. For example, if you didn't bring any new

ARBITRATION
participants in the plan, eventually the old ones would stop incurring benefits, retire, die off and the last benefits would be paid.
So if you are having fewer and fewer participants, then over time, your horizon of the plan will slowly start to decline.
Q And would this affect the risks associated with the plan doing well or not doing well?
A Yeah. I think we've discussed this earlier and it's been discussed quite a bit that with less participants and less contributions coming in, that the risk of an aggressive portfolio is somewhat higher because in the event that the plan does not do as well as anticipated, there are fewer bodies over which to amortize that difference.
And, likewise, if the plan does better than expected, there would be a lot less bodies to amortize that decline over.
Q When you talk about "less bodies to amortize," can you explain what you mean?

ARBITRATION
A Per participant.
So, in other words, if you need $10 million -- you need to fund a 10-million-dollar liability and you've got 10 million lives, well, that's not a whole lot of money. Well, if you have only ten lives, that's only a million dollars each.
Q I thought I was sure before but I'm not sure now about what you are giving an opinion on.
And so let me ask you: Do you have an opinion on whether the assumptions used to calculate The Times' withdrawal liability were unreasonable in the aggregate?
MR. MILLER: Objection.
MR. RICHMAN: This is cross-examination. Thank you.
BY MR. RICHMAN:
Q Do you have an opinion?
A Yes.
Q Now, how could you opine that the assumptions -- I'm sorry. And what is that opinion?
A The opinion was that the

ARBITRATION

assumptions are not reasonable in the aggregate.
Q And so they're unreasonable in the aggregate?
A Unreasonable in the aggregate.
Q So how could you opine that the assumptions used to calculate The Times' withdrawal liability are unreasonable in the aggregate without knowing what interest rate would produce the same withdrawal liability for The Times?
A For reasons that I just stated earlier in the day.
All of the other assumptions are reasonable. We know that the 7 and a half return is reasonable, so if you are using a much lower than 7 and a half percent return which is going to have a substantial impact on the liabilities, a 33 percent increase in the withdrawal liability, you've got no offsetting assumption factor. That's unreasonable.
Q But what I understood your testimony before is that you have not

ARBITRATION

developed a firm view as to what interest rate, when used to calculate the liabilities of the Fund, would yield the same result as the Segal blended rate that was used?
A That's correct. I didn't determine the rate but I did determine the impact on the numbers and it's substantial.
Q So how do you know that that rate that would produce the same result would not be a reasonable interest rate?
A I'm not following you.
Q Okay.
I understand that you don't know the rate, firmly anyway. You did some estimate of it at your deposition, correct?
A That's correct.
Q Okay.
And you do not know what rate for sure, and you didn't work on determining that rate as to a rate that would produce the same withdrawal liability rate as the Segal blend.
A That's correct.
Q So you don't know that.

ARBITRATION

And so let's just take -- maybe it's easier with a hypothetical.
Let's assume that rate were 6 and a half percent. Okay. Just for hypothetical purposes.
A Okay.
Q I know you're not saying it is.
A Okay.
Q And so if that rate were 6 and a half percent, how do you know that 6 and a half percent is not a reasonable rate to use for the Fund in calculating The Times' withdrawal liability?
A Because the actuary has certified that 7.5 percent is her best estimate rate. So 6 and a half percent can't be reasonable if that's the assumption.
Q So you are saying that 6 and a half percent is not within the range of the 7 and a half percent that the Fund actuary did?
A I didn't say that. I said the actuary picked a number, as she must. And once she picks it, you can't have another rate that represents the same number. The

ARBITRATION

number is 7 and a half. There can't be another number that's 7 and a half.
Q All right.
And so if she had picked 6 and a half --
A Okay. If she had picked 6 and a half.
Q If she had picked 6 and a half, would you have an opinion as to whether The Times' withdrawal liability calculated using 6 and a half was unreasonable?
A If I believed that 6 and a half was the right number, then that would very likely be reasonable, but that's a different situation.
Q But you haven't developed an opinion as to whether 6 and a half is a reasonable number?
A Correct. I mean, I'm not looking at that.
Q I'm just asking you if --
A That is correct.
MR. RICHMAN: I have no further questions.

ARBITRATION
MR. MILLER: Just take a minute or two. Everyone should stay here.
(Pause.)
MR. MILLER: I just have a couple brief follow-up questions.
REDIRECT EXAMINATION BY MR. MILLER:
Q I think you had testified that the actuary who succeeded you on the Consolidated Retirement Fund was Robin Zlotowitz; is that correct?
A That is correct.
Q Does she continue to be the actuary?
A No, I don't believe so.
Q And do you know who the Consolidated Retirement Fund has retained as the successor actuary?
A I'm not a hundred percent certain, but I do believe that Horizon Actuarial Services was hired, but I wouldn't swear to that.
MR. MILLER: No further questions.
RECROSS-EXAMINATION BY MR. RICHMAN:

ARBITRATION
Q Do you know who at Horizon Actuarial Services is providing services to the CRF?
A I do not offhand.
Q Do you know whether they've changed the interest assumption used to calculate withdrawal liability?
A On their Consolidated Retirement Fund?
Q Yes.
A I do not know.
MR. RICHMAN: That's it.
So now we have a little dilemma.
MR. MILLER: Yes.
Off the record.
(Pause.)
ROSANA EGAN,
having been first duly sworn by Arbitrator Irvings, was examined and testified as follows:
DIRECT EXAMINATION BY MR. MILLER:
Q Good afternoon, Ms. Egan.
Can you please state your full name and place of residence, but not street

ARBITRATION
address, for the record.
A My name is Rosana Egan. And I live in Lido Beach, New York.
Q Where are you currently employed?
A The Segal Company.
Q And how long have you been employed at the Segal Company?
A Since 1982.
Q And, generally, what are your responsibilities at the Segal Company?
A I'm an actuary at the Segal Company.
Q Are you an enrolled actuary?
A Yes, I am.
Q And what does it mean to be an enrolled actuary?
A It means that you can prepare certifications and governmental filings for a pension plan.
Q As an enrolled actuary, do you develop actuarial assumptions that a pension plan uses?
A Yes.
Q Do you develop those actuarial

ARBITRATION
assumptions in connection with the pension plan's funding obligations?
A Yes.
Q And as an enrolled actuary, what type of pension plan does your practice primarily focus on?
A Multiemployer defined benefit plans.
Q And for how long has that been the case?
A For myself?
Q Yes.
A Since I've been employed at the Segal Company. Or since I've been an enrolled actuary.
Q And how long have you been an enrolled actuary?
A Since approximately 1990.
Q And what does an enrolled actuary to a multiemployer pension plan do?
A That's a kind of broad question. We prepare our annual valuations of the status, the funding status of a plan, defined benefit plan, and prepare

ARBITRATION

governmental filings that go with that.
Q And you develop the actuarial assumptions in conjunction with those valuations and filings?
A Yes.
Q Are you familiar with the term "endangered status"?
A Yes.
Q What does the term "endangered status" mean in the context of multiemployer pension plans?
A Since the passing of the Pension Protection Act of 2006, the law required that annually that the status as to a plan -- as to what zone -- they created three zones that a defined benefit plan could be in.
And a certification needs to be done annually to determine what status a plan is, and endangered status is one of those statuses.
Q And let me just quickly get to the heart of the question that I was going to ask.

ARBITRATION

In connection with multiemployer pension plans that are in endangered status, what kind of services do you perform as an enrolled actuary?
A We first have to certify that they are in endangered status, and then we assist the trustees in their development of their funding improvement plan that needs to be developed.
Q And can you elaborate on the types of assistance that you provide to a multiemployer plan in helping and develop this funding improvement policy?
A We might provide projections as to their future status to help them come up with what remedies or schedules they need to develop to meet the requirements of a funding improvement plan.
Q Do you help them with the projections about future contribution amounts?
A Yes, future liabilities and contribution amounts.
Q For how many multiemployer plans do

ARBITRATION

you currently serve as the enrolled actuary?
A Approximately 20.
Q Over the course of your career, approximately how many multiemployer plans have you served as an enrolled actuary to?
A About maybe 50.
Q Fifty.
A Approximately, give or take.
Q Are you the enrolled actuary for the NMDU Pension Fund?
A Yes.
Q And how long have you been the Fund's enrolled actuary?
A Since about the mid '90s.
Q Is it fair to say approximately 1995?
A Approximately, give or take. I don't remember exactly.
Q Does anybody else from the Segal firm work with you in conjunction with your engagement by the Pension Fund here?
A Yes.
Q Can you identify those for me?
A John Urbank. And I have a team of

ARBITRATION

actuaries that has changed over the years but is currently James Yon (ph.) and Frank Santaciera (ph.).
Q And what is Mr. Urbank's role in connection with Segal's engagement by the NMDU Fund here?
A Mr. Urbank's role is the client relationship manager.
Q And what does the client relationship manager do?
A He is the person that deals mostly with the client and go to meetings and maybe will take whatever we do in-house and bring it to the client.
Q Do you know whether Mr. Urbank routinely attends the trustee meetings of this fund, the NMDU Fund?
A My understanding is that he does routinely attend. I don't know that he's made every single meeting, but ...
Q Okay. And do you attend meetings of this Pension Fund?
A Yes, but not all of them.
Q Can you provide an example of the

ARBITRATION
type of subject matter that would be addressed at a meeting that would cause you to attend? And by "meeting," I mean a meeting of the NMDU Fund.
A One example would be when we've completed an actuarial valuation report, I may go and present it or go over the report. Or if we've prepared some projections, I may be there to go over the projections.
Q Who is the current Fund administrator?
A Bob Costello.
Q How long has Mr. Costello been in that post?
A Approximately a year, give or take.
Q Who was the prior administrator?
A Mr. Murray Schwartz.
Q And approximately how long was Mr. Schwartz in the post?
A A long time. Trying to think. I think since I've been on the Fund. I don't remember if there was someone before him maybe, but it's a long time.
Q And just to recap, you've been the

ARBITRATION
enrolled actuary for this Fund since approximately 1995?
A The mid '90s, yes.
Q And was Mr. Schwartz serving as the Fund administrator when you became the enrolled actuary?
A That's what I'm not exactly sure of. It could have been someone else and then him, but I'm not sure exactly of when he started.
Q Do you know the reasons for Mr. Schwartz no longer serving as the Fund administrator?
A My understanding is they were going to a third-party administrator and closing down the Fund office.
Q Was Mr. Schwartz terminated?
A I would assume so, yes.
MR. RICHMAN: I hope we are not going to dwell on this topic.
BY MR. MILLER:
Q Let me talk for a moment about the NMDU employees who participated in this Fund. Okay. I'm going to ask you a couple

ARBITRATION
questions about the compensation for the participants in the NMDU Fund. Okay.
The Fund covers newspaper deliverers; is that correct?
A That's my understanding.
Q And is it correct that these newspaper deliverers are generally compensated for shifts worked?
A That they're compensated -- that's my understanding.
Q Do you know if the participants in this Fund also received compensation and pay while out on Workers' Compensation?
A I have no idea.
Q Do you know if the workers in this Fund also receive holiday pay?
A I don't know what they receive as far as that holiday pay.
Q In preparing actuarial valuation reports for this Fund, do you receive information from the Fund respecting compensation of the employee participants?
A Could you ask that question again?
Q Sure.

ARBITRATION
In preparing actuarial valuation reports for this Fund, do you receive information from the Fund, the Fund office respecting the compensation of the employee participants?
A Not -- no, not that I am aware of.
Q Okay.
A Not to prepare a valuation report.
Q Do you receive compensation information about the participants in this Fund in connection with preparation of or estimates of withdrawal liability?
A What do you mean by "compensation information"?
Q The compensation information -- strike that.
In connection, for example, with preparing an estimate of withdrawal liability of an employer, would you receive from the Fund office information about the compensation of that employer's employees who participate in the Fund?
A Compensation? Not typically.
MR. RICHMAN: Can I stop you

ARBITRATION

for one second.

Can we go off the record for one second.

(Discussion off the record.)

JOHN URBANK,

having been first duly sworn by Arbitrator Irvings, was examined and testified as follows:

DIRECT EXAMINATION BY MR. RICHMAN:

Q How are you today, Mr. Urbank?

A Fine, thank you.

Q You are currently employed?

A Yes.

Q By whom?

A The Segal Consulting Company.

Q And for how long have you been employed by the Segal Company?

A Thirty-four years.

Q Thirty-four years?

A Thirty-four years. I know it's hard to believe.

Q That's good.

And what is currently your role at the Segal Company?

ARBITRATION

A I'm a benefits consultant and a client relationship manager for the Segal Consulting Multiemployer Group.

Q And are those two different roles or are they part of the same role?

A Part of the same role.

Q And what do you do as a benefits consult and clients relations manager?

A I'm assigned a book of business, multiemployer trust funds, pension and welfare annuity.

My role is I'm basically the face of the Segal Company, present our services to them, actuarial, health benefits, pension benefits to the client, which would constitute usually the fund director, fund managers and the boards of trustees, and deal with the other professionals that are employed by the clients.

Q When you refer to the fund director, what is the position of the fund director?

A Each trust fund usually has employees, a fund director, fund manager.

ARBITRATION

They have different titles.

Their role is to oversee the operations of the specific funds, whether they be pension, welfare or annuity. Responsible for the day-to-day operations.

We deal with them in terms of providing our services and consulting.

Q For how long have you been a benefits consultant at Segal?

A About 20 years.

Q And before you were a benefits consultant, what was your position at Segal?

A I worked in the Health Group underwriting area at first as an analyst, then moved up to assistant manager in the department.

Q What types of services did the Health Group underwrite --

A Health Benefits Underwriting Services.

Q Sorry. What services did they provide?

A We provided our clients with various services related to the health fund.

ARBITRATION

We do projections of their benefit plans. We acquire or evaluate their insurance products, whether it be on an insured basis or a self-funded basis. We do self-funded feasibility studies.

We solicit proposals from different vendors and we analyze them, present them to the clients, make recommendations regarding their benefit program. We do compliance work. Summary Plan Descriptions, participant notifications.

Q And how long did you serve in that group?

A Approximately ten years.

Q So I think at least four years.

Did you have a position before being in that group at Segal?

A No. So it was more likely ten years in that capacity and 24 years in the consulting.

Q As a benefits consultant?

A Yes, sir.

Q And how many plans do you provide currently benefit consulting services?

ARBITRATION

A Approximately ten to 12 clients and they'll have either a pension, a welfare fund and some will have annuity funds as well.

Q So it's ten to 12 clients and eight clients could have a pension fund and a welfare fund and possibly an annuity fund.

A Yes.

Q So how many pension plans do you provide services to?

A It would be 12.

Q Twelve?

A Twelve.

Q And what types of pension plans are those?

A Mostly they're defined benefit plans or predominantly defined benefit plans.

Q Are any of the 12 plans you are consulting to other than employers benefit plans?

A The annuity fund would be defined contribution plans.

Q So the annuity funds in the 12 you

ARBITRATION

mentioned?

A No, those would be separate.

Q I'm just focusing on pension funds.

A Right. There would be 12 pension funds.

Q And the NMDU pension plan would be one of those funds?

A Yes, sir.

Q And for how long have you provided services to the NMDU pension plan, which I'm going to refer to as either the Pension Plan or the Pension Fund, okay?

A Okay. I believe Segal was retained by them in 1990 or 1991.

Q And have you been the benefits consultant from Segal to the plan since 1990 or '91?

A Initially, I was not then the consultant that was assigned. The business left the Segal Company and then I stepped into that role probably three to four years later. Around 1995.

Q So approximately 1995?

A Approximately.

ARBITRATION

Q When you became the benefit consultant to the Pension Fund, who was the enrolled actuary to the Pension Fund?

A I believe the enrolled actuary was Cecilia Villar.

Q Was she an employee of Segal?

A Yes, sir.

Q And for how long was Ms. Villar the enrolled actuary for the Pension Fund?

A I believe only a couple years.

Q And did she start being the enrolled actuary before you became the benefit consultant?

A No. Actually, the person who was initially on the Fund was an enrolled actuary.

Q Okay. And who was that?

A Michael Kaplan.

Q So Mr. Kaplan was the enrolled actuary immediately after Segal became the actuary to the Pension Fund?

A Yes.

Q Okay. And Ms. Villar became the enrolled actuary?

ARBITRATION

A She probably worked with Mr. Kaplan on it. In our Actuarial Department, we usually have a team that works on each of our clients which could -- there is a signing enrolled actuary. There could be two other team members in our Actuary Department that work for the client. I don't recall who was the actual signing enrolled actuary. Currently, it's Rosana Egan.

Q When did Ms. Egan become the enrolled actuary?

A Probably in the late '90s.

Q Who was the administrator of the -- or Fund manager of the Pension Fund when you became the benefit consultant?

A Barney Barlam.

Q Can you spell that last name, please.

A B-A-R-L-A-M.

Q And he is not still the administrator, correct?

A No. I believe he's deceased.

Q And when did Mr. Barlam cease being

ARBITRATION

the administrator of the Pension Fund?
A Mid '90s.
Q And who succeeded Mr. Barlam as the administrator?
A Murray Schwartz.
Q Did Murray Schwartz become the administrator before Rosana Egan became the enrolled actuary?
A I believe so.
Q Who was the counsel to the Pension Fund when you became the benefit consultant?
A I don't recall.
Q Do you know who the counsel is today?
A Today I think they employ three counsels: Proskauer Rose, employer counsel; Meyer, Suozzi, English & Klein, Union counsel; and Elizabeth O'Leary who is with -- I don't recall her firm.
Q Okay.
And is there someone specific at the Proskauer firm who handles the Pension Fund?
A Neal Schelberg.

ARBITRATION

Q And for how long has Mr. Schelberg been the employer counsel?
A My estimate, 15 years.
Q And is there someone at Meyer Suozzi who handles the Pension Fund?
A Irwin Bluestein.
Q And how long has Mr. Bluestein been counsel to the Pension Fund?
A Two to three years. They've only been recently retained.
Q And Ms. O'Leary, how long has she been counsel to the Fund?
A She's probably worked with the Fund for the last five to six years.
Q And does Mr. Bluestein have a specified role as --
A He's Union counsel.
Q And that leaves Ms. O'Leary. What counsel is she?
A Counsel to the counsel. She worked a lot with the Fund director.
Q Okay. How long did Mr. Schwartz serve as the Fund director?
A Well, as I said, I think he started

ARBITRATION

in 1995, the mid '90s, and I believe he was dismissed about this time last year.
Q So in roughly the winter of 2014?
A That would be correct.
Q And do you know why he was dismissed?
A The Fund transitioned to a third-party administrator and closed down the operations of an independent Fund office.
Q And who is that third-party administrator?
A C & R Consulting.
Q C & R, the ampersand sign?
A Yes, sir.
Q And is there anyone specifically at C & R Consulting who provides services to the Fund?
A I believe the principal would be Robert Costello.
Q When you became benefit consultant to the Fund, who was the auditor to the Fund?
A As far as I can recall, it's been

ARBITRATION

the one that they have now.
Well, I think he was dismissed recently. So Mitchell Lewis was the -- M.R. Weiser I believe was his firm. I don't recall when he was initially engaged.
Q M.R.?
A M.R. Weiser. W-E-I-S-E-R.
Q And do you think that he's been terminated as the auditor to the Fund?
A Yes.
Q And when did that occur?
A I'm going to say fall of last year.
Q And do you know why that happened?
A No.
Q Who is the auditor currently?
A I believe it's Steinberg, Steckler & Picciurro is the name of the firm.
Q And is there a person at the firm who in particular provides services to the Fund?
A I don't recall his name.
Q Before you worked at Segal, were you previously employed?

ARBITRATION

A Yes.
Q At a full-time job?
A Yes.
Q And --
A Now you are really asking me to go back.
Q And what did you do?
A Prior to Segal, I was a staff accountant.
Q Where was that?
A I was a staff accountant for the Kemper Insurance Group for a while. In between that, I had a sales position, actually.
Q At Kemper?
A No, no. There's a time between Kemper and Segal when I was not doing accounting.
Q Now, what types of services do you generally provide to multiemployer pension plans to which you are the benefit consultant?
A We serve as the enrolled actuary. We do the annual actuarial valuations.

ARBITRATION

We do the Schedule MB, which is the actuarial information for the Form 5500 and entails us doing a data request on the pension data. We review that to prepare the valuations.
We provide services related to compliance, Summary Plan Descriptions, plan amendments. We attend boards of trustees meetings.
Q Okay.
And of those services that Segal provides to Pension Fund clients, which ones do you get involved in?
A Well, I'm the benefits consultant so I'm the day-to-day person that deals with the client, so I'm involved with pretty much all our services that if our client needs a particular service -- you know, we have a normal retainer agreement which specifies what our services are.
So I'm basically the person who makes sure those things -- we get the information from the clients, we get those things done and, in conjunction with our

ARBITRATION

actuarial team, get the services completed, presented and provided to the necessary either professionals or to the board.
Q Do you do actuarial work for the funds?
A No, I do not.
Q Are you an actuary?
A No.
Q Do you know what the Segal blend method is?
A It's a method for Segal to do withdrawal liability.
Q And do you know how it works?
A Generally, basically it's our preferred method. It's our best estimate of what the withdraw liability should be for a company that withdraws from a Pension Fund.
Q And when did Segal start using that method?
A I'm going to say back when the Multiemployer Pension Act started -- back on the onset of the Multiemployer Pension Act.
Q And that was before you actually started work, correct? Or approximately the

ARBITRATION

same time?
A Approximately around the same, '80s.
Q But before you became a benefit consultant?
A Yes.
Q And so when you became a benefit consultant, was Segal already using the blended method?
A Yes.
Q Okay. And do you have an estimate of the number of clients for which you have served as the benefit consultant over the 24 years you've been a benefit consultant?
A Probably somewhere between 12 and 18.
Q And how many of those pension funds use the Segal blend?
A Best of my knowledge, all of them.
Q Are Segal actuaries required to use the Segal blend?
A I'm not sure if they're required to use it. As I said earlier, that's our company's understanding. It's at their best

Page 449

ARBITRATION

estimate. Obviously, they can discuss with clients if there's an alternative that might be -- that ultimately what we use could be up to the client.

Q Do you have an estimate of what percentage of Segal pension fund clients use the Segal blend?

A Actual percentage, no. I would say a majority of them do.

Q Do you have an estimate of how many multiemployer pension plans Segal provides actuarial services to?

A Hundreds. I don't know the exact number.

Q You testified you go to trustee meetings, correct?

A Yes.

Q What do you do at trustee meetings?

A Present any particular services or work that we've done since the last meeting or that are required annually. In some instances, we take notes, record the minutes at the meetings, provide any comments or consulting services based upon what's

Page 450

ARBITRATION

reported by other professionals, accountant or investment managers, if we have any input on how it affects the operations of the pension fund, the value of the funded status of a pension plan.

Q Okay.

Did you ever take minutes at the NMDU Pension Fund?

A Yes.

Q And for what period of time did you do that?

A Probably since when Murray Schwartz became the Fund director, the mid-1990s.

Q Oh, okay. So did you take the minutes all during the time period that Mr. Schwartz was the Fund director?

A Yes.

Q And does he still take them now?

A I'm not involved with the Fund as we used to be.

Q What do you mean by that?

A We were terminated as consultants to the Welfare Fund back in October 2014, and I understand we're being considered to

Page 451

ARBITRATION

be replaced on the Pension Fund any day.

Q Have you ever heard the term "contribution base unit"?

A Yes.

Q Do you know what it is?

A It's usually the factor by which contributions are submitted to a fund.

Q And had you ever heard the term "contribution rate"?

A Contribution rate is usually the monetary amount that's contributed based upon the factor of a base unit.

Q Are the contribution rate and the contribution base unit the same thing?

A No.

Q During the time you've been the benefit consultant to the Pension Fund, did you develop an understanding as to what the contribution base unit was for the Pension Fund?

A My understanding is that contributions were submitted based on days or shifts worked.

Q And how did you develop that

Page 452

ARBITRATION

understanding?

A Based on what was provided to us in terms of information on how the plan was receiving contributions from its contributing employers.

Q And you said "based on information that was provided to us."

And who provided that information to you?

A The Fund office.

Q And who in the Fund office?

A Typically -- well, the staff, but usually I'm the oversight of the Fund director.

Q Let's get into the staff a little bit of the Fund office.

During the time that Mr. Schwartz was the Fund director, and let's start to -- if we can start from the last time that he was the Fund director, the winter of 2014, and work ourselves backwards, can you tell us who the staff members were of the Fund office?

A He had a bookkeeper. Her name I

ARBITRATION

believe was Albergo.

A woman who dealt mostly with the Welfare Fund, Laura Achuto (ph.).

There was another woman that worked there, first name was Rose. I don't know her last name.

There was a woman who dealt primarily with the pensions. Her name was Kathy Revy. R-E-V-Y.

I think that was the most recent staff prior to the closing of the Fund.

ARBITRATOR IRVINGS: I'm sorry. Did you say Rose?

THE WITNESS: Rose.

A She did multiple tasks mostly with the Welfare, I believe.

Q And how long was Ms. Albergo employed by the Fund office?

A I don't know precisely. She was there for at least ten years. Ten, fifteen years that I can recall.

Q So when you became the benefit consultant, she was not there?

A I don't recall precisely. Many of

ARBITRATION

them were long-term employees.

Q And as the bookkeeper, what did Ms. Albergo do?

A I was never in the office, but long enough to know, handled the receipt of contributions, probably posting contributions day to day, journal entries, et cetera, working with the Fund's outside auditors to have the books ready for the annual audits.

Q And did you communicate with Ms. Albergo during the time both she was employed by the Fund and you were the benefit consultant?

A Yes.

Q And was that on a regular basis?

A Occasionally. Occasionally. Most of our communications were directly with the director.

Q With Mr. Schwartz?

A With Mr. Schwartz.

Q And how often would you speak to Mr. Schwartz?

A More frequently when there was a

ARBITRATION

trustees meeting. Occasionally. Few times a month. Tried to keep in contact with our clients more so when certain reporting requirements or valuation was going to be completed. There was going to be a trustees meeting, we would help set the agenda with him. So more frequently near meetings and during filing times for the requirements.

Q Did there come a time when Segal was asked to perform withdrawal liability calculations for the Fund?

A It was part of our service.

Q And did it actually happen?

A Yes. We probably calculated several withdrawal liability calculations for employers.

Q Okay. Let me show you Exhibit 42.

A Okay.

Q And you can see there are a bunch of pages here. They are all similar in their setup, but please take a quick look at them.

Have you ever seen these before?

A Yes.

ARBITRATION

Q What are they?

A Those are paid by the Fund office. They're notification to the employer what the contribution rates to the Fund are.

Q And on the left-hand side of the page, you see under -- and I'm looking at 2371 so we're all looking at the same thing.

2371 at the bottom of the page, which is the second page.

A Yup. Got it.

Q You see that?

A Yes.

Q So that's from March 31, 2013?

A Uh-huh.

Q I'm sorry. You have to answer audibly.

A Yes, sir. I'm sorry.

Q And so you see it says "effective 3-31-2013"?

A Yes.

Q And under that it says, "day rate, short night, long night, SAT night."

What are those four items?

A Those are different shifts, periods

ARBITRATION
that employees can work for the employer.
Q Let me show you Exhibit 104.
MR. RICHMAN: I'm mindful of the time here.
MR. MILLER: Thank you.
A Okay.
Q Can you identify what this is, please.
A It's a letter prepared by me to Mr. Schwartz requesting information in order to calculate the withdrawal liability for the Jolt Corporation.
Q And did you prepare this letter?
A Yes.
Q That is your signature at the bottom of the letter?
A Yes, it is.
Q And the ccs on the letter, you see Mr. Bluestein, Mr. Mangan?
A Yes.
Q Mr. Schelberg you've identified.
Who is Mr. Mangan?
A Mr. Mangan was co-counsel to the Funds at some point in time during the years

ARBITRATION
that I was consultant to the Fund, as there were others.
Q Okay.
And did you send copies of this to them?
A Yes.
Q Now, in the paragraph numbered 2, you see that?
A Yes.
Q And that's information that you were asking for?
A Correct.
Q Why were you seeking that information?
A We require that to come up with the payment schedule for the withdrawal liability.
Q Let me show you Exhibit 15 which is in a different book. White one, I think.
You don't have to turn back to Exhibit 104, but did Mr. Bluestein and Mr. Mangan or Mr. Schelberg ask you why you were asking for shifts/hours in your request?

ARBITRATION
A Did counsel ask us why?
Q Yes.
A No.
Q Did Mr. Schwartz ask you why?
A I don't recall specifically but I'm sure he did probably because he questioned everything we did.
Q Let's go to Exhibit 15, please. Can you identify this, please.
A Similar to the other one. It's a request for information in order to calculate the withdrawal liability in this case for The New York Times.
Q And you see the ccs are Jani Rachelson and Neal Schelberg.
A She was the counsel of flavor at that time, I guess. She was counsel at that time. And Neal Schelberg was.
Q And she was Union trustee counsel, Ms. Rachelson?
A Yes.
Q Did Mr. Schelberg or Ms. Rachelson ask you a question as to why you were seeking shifts or hours?

ARBITRATION
A No.
Q Let me show you Exhibit 16.
See if you can identify that for us.
A Similar letter request for information to do a withdraw liability calculation for the Employer City and Suburban. Ccs at that time were Elizabeth O'Leary, counsel at that time, and Neal Schelberg, except I believe he shouldn't have gotten this letter and that's why you see the line through it. So I'm not sure if he actually received it.
Q Did Ms. O'Leary ask you why you were asking for shifts or hours?
A No.
Q Let me show you Exhibit 97.
Can you identify what this is?
A It's a memorandum from myself to Mr. Schwartz providing him with the withdrawal liability determined for Brooklyn News for a withdrawal that occurred in the 1989 plan year.
Q And you see on the upper right-hand

ARBITRATION

side, it says Exhibit K?
A Yes, sir.
Q What is that?
A That would identify that this was an exhibit to the board of trustees meeting minutes.
Q And you see that there is a cc on the second page --
A Right.
Q -- to co-counsel.
A Yes.
Q And do you know who co-counsel was at that time?
A I believe Union counsel may have been Warren Mangan's firm. I'm not a hundred percent sure who it was, Employer counsel.
Q Okay. Let's go to -- flip you back to the first page. And that's -- look at the second paragraph.
And if you would just read to yourself the second sentence in the second paragraph.
A Okay.

ARBITRATION

Q Why is the phrase "average annual shifts of 5835" used? Why did you use that in this memo?
A That's used to calculate the annual payment schedule. The shifts and the highest contribution rate.
Q Do you recall anybody, the trustees, Mr. Schwartz or co-counsel, raising a question as to why shifts were being used to calculate the payment schedule?
A No.
Q Let's look at Exhibit 98.
Can you tell me what this is?
A Memorandum from our firm, myself and Cecilia Villar, who was the actuary at that time, providing the estimated withdrawal liability for Passaic Evening Journal.
Q So what the letter says is, "We estimated the withdrawal liability for Passaic Evening Journal, an employer of the above fund, which withdrew on August 15, 1994."

ARBITRATION

And why was this an estimate?
A I don't believe it was known that it was definitely a withdrawal from the Fund. So the date was not certain. So if the date's not certain, we'd assume it's an estimate because if it's a later date, the actual withdrawal liability would have to be calculated based on a subsequent valuation.
Q Well, if you look in the first paragraph, in the third sentence, the sentence that begins with, "Since the withdrawal occurred after May 31, 1994, these results are preliminary and must be determined upon the completion of the May 31, 1994 valuation."
A And that's why it would be considered an estimate because we did it based upon results of the May 31, 1993 valuation.
Q But at the time it was done, you actually knew the withdrawal date.
MR. EATON: Objection.
ARBITRATOR IRVINGS: Sustained.
BY MR. RICHMAN:

ARBITRATION

Q Did you know the withdrawal date at the time this estimate was done?
A Well, since this was -- when they requested it, it was subsequent to the end of the May plan year, so we assumed that it was going to be an estimate, would be later.
I don't know what the precise date of the withdrawal was.
Q The first line of the letter says, "As requested, we estimate withdraw liability for Passaic Evening Journal, an employer of the above fund, which withdrew on August 15, 1994."
Do you have any reason to believe that that date's not correct?
A No. That date would have had to be provided by the Fund office, so, no.
Q Take a look at the second paragraph and take a look at the third sentence which starts with, "The payment schedule flex, average annual shifts" ...
A Yes.
Q And why did you mention the average annual shifts?

ARBITRATION
A As I said earlier, when we developed the payment schedule, we used the shifts as the base unit and the highest contribution rate in effect.
MR. EATON: If you got another one of these in the mid '90's that have shifts in it, I'm going to stipulate --
MR. RICHMAN: I've got Exhibit 101, 102 --
ARBITRATOR IRVINGS: Well, they say what they're going to say. If you are only pointing out what the letter says, they say what they say.
MR. RICHMAN: All right.
MR. MILLER: Because we don't have a lot of time.
BY MR. RICHMAN:
Q Was the Segal blend ever discussed at trustee meetings that you attended?
A It may have been. I don't recall specifically.
Q Was the interest assumption used to calculate withdrawal liability ever

ARBITRATION
discussed at a trustees meeting?
A No, not to the best of my knowledge.
MR. RICHMAN: I'm finished.
CROSS EXAMINATION BY MR. EATON:
Q Mr. Urbank, how are you?
A Good. How are you?
Q Good.
I think you described your role with the Fund as that of a benefits consultant; is that right?
A Yes.
Q And in that role you listed some responsibilities and they include serving as the point of contact to the Fund of Segal; is that right?
A Yes.
Q And presenting the results of Segal's work to the Fund?
A Yes.
Q Does your role include attending collective bargaining negotiations between the Employers and the Funds?
A No.

ARBITRATION
Q Does your role include reviewing collective bargaining agreements that give rise to contributions?
A No.
Q Does your role include receiving or reviewing the reports that contributing employers send to the Fund each month that detail their contributions?
A Remittance reports, no.
Q Does your role include auditing the contributing employers to ensure that they contribute the correct amount of money?
A No.
Q Does your role include any direct interaction with the contributing employers?
A No.
Q And that would include The New York Times, correct?
A Correct.
Q Let's talk a little bit about past practices.
You discussed some exhibits with your counsel where you showed withdrawal liability corrections; is that right --

ARBITRATION
withdrawal liability calculations?
A Yes, sir.
Q Let's start with Exhibit 97.
And you were shown this document during your direct examination, right?
A Yes.
Q And this is a withdrawal liability -- excuse me. The letter is dated January 6, 1995?
A Yes.
Q And it's for withdrawal liability for the Brooklyn News Company that withdrew in the year ending May 31, 1989; is that right?
A Yes.
Q Why did it take six years to assess withdrawal liability? If you know.
A I have no idea.
MR. RICHMAN: Objection as to relevance.
Q Did you review the collective bargaining agreement that gave raise to Brooklyn News contributions?
A No.

Page 469

ARBITRATION
Q And this was a demand for complete withdrawal; is that right?
A This was in response to a request from the Fund to do a calculation of the withdrawal liability.
Q So did Brooklyn News actually withdraw?
A I don't know.
Q Let's look at the first sentence. It says, "As requested, we have calculated the withdrawal liability for Brooklyn News Company which withdrew in the year ending May 31, 1989."
Do you still think this is an estimate or is this an actual --
A I didn't say it was an estimate.
Q Let me finish the question.
Is that an estimate or is this a demand for a withdrawal liability?
A It's not a demand. It's a request for the calculation. It's the calculation of withdrawal liability if this employer actually withdrew in the time period specified by the client to us.

Page 470

ARBITRATION
Q So is it your testimony you don't know whether Brooklyn News Company withdrew?
A I don't know if they actually withdrew and were assessed a withdrawal liability.
Q Is there any mention in this calculation of an estimate that the trigger of the withdrawal was a 70 percent decline in contribution base units?
A No.
Q Let's go to Exhibit 98.
And this is a letter from you dated January 23, 1995; is that right?
A Yes.
Q And I think we looked at this during your direct examination.
A Yes.
MR. RICHMAN: Hang on a second.
Q Let's start again. Exhibit 98. And if I could direct your attention to Paragraph 2.
It says, "We have calculated the preliminary withdrawal liability for Passaic Evening Journal to be $150,274."

Page 471

ARBITRATION
Do you see that?
A Yes.
Q Do you know if Passaic actually withdrew?
A No.
Q Is there anything in this letter that describes the withdrawal as triggered by a 70 percent decline in contribution base units?
A No.
MR. EATON: And, Mr. Arbitrator, there were several letters sort of analogous to what Ron did. There were several letters that were like this from the mid '90's.
I can read the exhibit numbers I was going to point to so it's clear in the record, but ...
MR. RICHMAN: If you needed to make the time, that's fine.
MR. EATON: That's fine. So I would just like to give him the opportunity to review them because I have the same sort of series of

Page 472

ARBITRATION
questions.
ARBITRATOR IRVINGS: Perfect.
MR. EATON: Let me give you the exhibit numbers. You can take a look at them and I'll ask the same sort of questions.
MR. RICHMAN: Fine.
MR. EATON: So it's 99, 100, 102 and 103.
MR. RICHMAN: And just tell me the series of questions that you want to ask.
MR. EATON: I basically want to ask him if any of these have a 70 percent decline as the trigger for withdrawal liability, and whether he read the contribution -- the collective bargaining agreements that gave rise to contributions for any of these employers.
MR. RICHMAN: Those two questions. Okay.
THE WITNESS: Did you say 103, also?

ARBITRATION
ARBITRATOR IRVINGS: 103, also.
THE WITNESS: And the question?
BY MR. EATON:
Q So my question is: In any of those letters pertaining to withdrawal liability, did any of them have as a trigger for the withdrawal a 70 percent decline in contribution base units?
A I don't believe so.
Q Did you read the collective bargaining agreements that gave rise to contributions for any of the employers listed in those letters?
A No.
Q Let's talk about Exhibit 16.
Do you have it?
A Yes.
Q I believe you testified on your direct examination that in the bottom left-hand corner where it says "cc," Mr. Schelberg's name has a line through it; is that right?
A Yes.
Q And you testified that the reason

ARBITRATION
there was a line through it is because he was not supposed to get this; is that right?
A I believe so.
Q Why wasn't he supposed to get this?
A I believe his firm is counsel to City and Suburban.
Q Any other reason?
A No.
Q And why shouldn't he have gotten it if his firm was counsel to the City and Suburban?
A He would have a conflict of interest.
Q And who decided that he would have a conflict of interest?
A I think it would be the Fund.
Q So is it your testimony that it was the Fund who decided to not provide this --
A That I should not have provided --
Q Let me finish.
Is it your testimony that it was the Fund who decided not to provide this document to Mr. Schelberg?
A Yes.

ARBITRATION
Q And by "the Fund," who do you mean in particular?
A Fund director.
Q And who would that be in April of 2010?
A Murray Schwartz.
Q Did you have a conversation with Mr. Schwartz about why Mr. Schelberg should not get this document?
A I probably sent it to -- he probably saw that and told me not to extend it to him. Or he may have gotten this letter.
Q Meaning Mr. Schelberg?
A Yes, possibly.
Q Who put the line through it, if you know?
A I don't know.
Q When did you have this conversation with Mr. Schwartz about Mr. Schelberg not receiving this letter?
A Probably around the time period this letter going out, 2010.
Q Was it a phone call or in person?

ARBITRATION
A Probably a phone call.
Q Did he explain to you why he shouldn't receive the document?
A I was aware that -- he explained to me and I was aware that City and Suburban, The New York Times was a client of the Proskauer firm.
Q Thank you.
Let's talk about trustee meetings.
You said you attended the trustee meetings for both the Welfare and the Pension Fund; is that right?
A Yes.
Q And is one of your roles to keep the minutes of the meeting?
A Yes.
Q Is it fair to say you've been going to those meetings for 15 years now?
A Yes.
Q Or more.
A Somebody has to do the dirty work.
Q Okay.
Could you sort of describe the process of how the notes that you take at

ARBITRATION

meetings become minutes?
A The minutes are drafted from my notes. I would draft them. They become typed, sent usually -- with this Fund were sent to the Fund director and typically Neal Schelberg.
They would edit and correct the minutes, return to me, which would then be considered the final minutes, and they would then be distributed to the board and professionals who attended the meeting either via most likely mail or, in some instances, e-mail to those who got e-mail.
Q Is there someone who didn't get e-mail?
A The Fund was not big on e-mail.
Q Let's talk about communications from the Fund.
Do you know what an actuarial valuation is?
A Yes.
Q Does Segal draft the actuarial valuations for the Fund each year?
A Yes.

ARBITRATION

Q And what is involved or can you describe an actuarial valuation?
A Actuarial valuation is an annual report that provides the Fund with its status of the Pension Fund based on their plan year that runs from June to the end of May.
It lists information related to the participants, the number of retirements, the asset return, the investment returns, any changes in actuarial assumptions. It would provide information on the unfunded vested benefits or the withdrawal liability each year for the overall fund.
Other regulatory requirements that are reported annually would be included in the valuation.
Q Do you have a role in the drafting of the valuation?
A I peer-review it, edit it and would distribute it to the board of the client.
Q And I think, given all the things you listed that go into the valuation, is it fair to say that the actuarial valuation

ARBITRATION

contains a lot of information about the Fund?
A Yes.
Q And would the information in those valuations be important to contributing employers?
A Yes.
Q Let's take a look at Exhibit 20, please.
Are you there?
A Yes.
Q Is this an example of an actuarial valuation?
A This would be a Segal actuarial valuation.
Q And this is for review as of June 1, 2006; is that right?
A Yes.
Q Let me direct your attention to Page SEGAL-280. That's I think the very last page.
A Yes.
Q And at the very bottom, it says "contribution rate."

ARBITRATION

What does it say next to contribution rate?
A Six percent of wages.
Q What does that mean to you?
A The rate was a percentage of the wage.
Q I think you were asked some questions about contribution rate and CBUs in your direct examination; is that right?
A Yes.
Q What is your understanding of what a contribution rate is?
A Contribution rate is usually the monetary amount that is submitted by contributing employers to a particular fund.
Q And what is your definition of a contribution base unit?
A The base unit would be the factor upon which the monetary amount is submitted to the fund.
Q And so going back to our exhibit, how would you define what is listed there as 6 percent of wages?
A It doesn't give you the exact

ARBITRATION

amount. It's just giving you explanation that the rate is a percentage of the wage, just the rate.

Q I don't understand what you mean by "It doesn't give you an exact amount."

What do you mean by that?

A In other words, if the wage rate was $100, the contribution rate would be 6 percent of the wage which could be six dollars.

Q Okay. Does a rate always have to be a monetary amount?

A Typically, it would be.

Q I think my question a little bit different. I asked does a rate always have to be a monetary amount.

MR. RICHMAN: I think he answered it.

A Contribution rate is typically a monetary amount.

Q Okay. So typically doesn't mean always, right?

A Well, if I could interject my experience with other funds, the

ARBITRATION

contribution rate is a dollar amount and it gets contributed based upon a factor in order to submit -- the employer submit to the Fund. Could be based on hours, weeks, days, shifts.

Q Could a rate be a percentage?

A Could the rate be -- well, it's a percentage of something which ultimately becomes mathematically a number.

Q Let's look at Exhibit 21.

And this is the actuarial valuation as of June 1, 2007.

A Uh-huh.

Q Could you flip to Page SEGAL-342.

Could you read what's listed for contribution rate, please.

A Six percent of wages effective June 1, 1999, although 6.5 percent of wages effective January 1, 2008.

Q And is it fair to say that the actuarial valuations for the years 2007 through approximately 2012 describe the contribution rate in the same way we're looking at on this page right here?

ARBITRATION

A Yes.

Q Let's look at Exhibit 27.

And this is the actuarial valuation as of 6-1-2013; is that right?

A Yes.

Q Could you flip to the last page that's SEGAL-760.

A Yes.

Q Are you there?

A Yes.

Q What does it state next to "contribution rate" here?

A Eight percent of the shift rate per shift effective January 1, 2009.

Q And is it fair to say that the description of the contribution rate here differs from the description listed for contribution rates in the prior actuarial valuations?

A It differs in the percentage and it differs in the wording, yes.

Q And why is the wording different?

A We at Segal decided to make it clearer as to what the explanation of the

ARBITRATION

shift rate was.

Q And how was this language clearer than the language used previously?

A This refers to the percentage of the shift rate or the wage rate.

Q Maybe I didn't understand the answer.

How was this language more clear than the language used previously?

A Because it indicates that it's a percentage of the shift rate per shift.

Q So is it your view that the language in prior actuarial valuations were unclear?

A No. It was just probably not as clear as it should have been.

At the time, we used wages because there was an allocation of contributions going from the Pension Fund to the Welfare Fund.

As you recall earlier, the rates were lower percentages and the reason for that is that a portion of that rate was being allocated to the Welfare Fund. And

ARBITRATION
that's part of the reason why we were referring it to that previously.
Q Did you consult with the Fund for changing the language?
A No.
Q When did you change this language?
A When we prepared this earlier last year.
Q And was that after The New York Times challenged the withdrawal liability assessment in September of 2013?
A I believe it was.
Q Let me direct your attention to Exhibit 42.
You were asked about this on your direct testimony.
What is your understanding of what this sheet means?
A It's informing the contributing employer, in this case The New York Times, of the contribution rate they should submit to the Fund, the Pension and Welfare Funds.
Q Do you get this document -- well, strike that.

ARBITRATION
Under what circumstances would you see this rate sheet?
A Typically, we were getting this when we requested information for the withdrawal liability.
Q Is it fair to say that these sheets were developed and sent out yearly?
A I would think the Fund would do that if there were changes in the rates or changes in the contribution requirements, yes.
Q But you only got these when you were preparing withdrawal liability calculations; is that right?
A Yes. We didn't get them regularly.
Q What did you do after you received these sheets? Did you keep them?
A Typically, we would keep them.
Q So is it fair to say that looking at this sheet for the Pension Fund, that there are eight different contribution rates for Pension Fund contributions?
A Yes.
Q Do you have any understanding about

ARBITRATION
whether certain employees get paid a rate different than what's listed here on these sheets?
A Repeat that, please.
Q Do you have any understanding about whether employees receive pay rates that are different than the ones listed on this sheet?
A Specific employees?
Q Yeah, correct. If they do something to earn some sort of pay different than what's on these.
A No.
Q Let's talk a little bit about withdrawal liability estimates.
Is it common for a contributing employer to request an estimate of its potential withdrawal liability?
MR. RICHMAN: Objection as to what "common" means. What does that mean?
MR. EATON: If he understands the question, he can answer.
ARBITRATOR IRVINGS: Well,

ARBITRATION
"common" is unclear. Why don't you rephrase the question.
BY MR. EATON:
Q In your experience, do employers request estimates of their withdrawal liability?
A Yes.
Q In your experience, do employers request information about withdrawal liability estimates and other actuarial factors that impact plan funding?
A Yes.
Q And, in fact, The New York Times requested withdrawal liability estimates; is that right?
A Yes.
Q And, in fact, they requested information above and beyond more than just a withdrawal liability estimate; isn't that right?
A I believe so.
Q In your experience, why do employers request such information?
MR. RICHMAN: Objection.

ARBITRATION

ARBITRATOR IRVINGS: He can answer in his experience, if he knows.

A They want to know what the amount is related to their fund, and some public corporations require that for their financial statements.

Q Is it fair to say that when it comes to information about a pension fund, the pension fund has an information advantage over the contributing employers?

MR. RICHMAN: Objection.

ARBITRATOR IRVINGS: I'm sorry. Rephrase that.

MR. EATON: I'll rephrase the question.

BY MR. EATON:

Q When it comes to information about the pension fund, is it fair to say that the pension fund has more information about the fund than contributing employers?

A Yes.

Q So do you think that responses to requests from employers, that those

ARBITRATION

responses from the fund be accurate?

MR. RICHMAN: Objection.

MR. EATON: What's the objection?

MR. RICHMAN: So do you think responses to request from employers, that those responses from the fund be accurate?

MR. EATON: I'll rephrase the question.

BY MR. EATON:

Q When an employer seeks information from a pension fund, either withdrawal liability estimate or other actuarial information, is it important that the responses from the fund be accurate?

A I would think so.

Q In your practice, have you seen employers hire outside consultants to communicate with pension funds on the employers' behalf?

A Yes.

Q They hire actuaries, right?

A They hire actuaries.

ARBITRATION

Q They hire attorneys, right?

A They may.

Q And for some information, pension funds charge a fee to provide that information; is that right?

A They can.

Q And those fees can be upwards of a thousand dollars; is that right?

A Yes.

Q Do you think an employer should be able to rely on the information it receives from a pension fund?

MR. RICHMAN: Objection.

ARBITRATOR IRVINGS: That's an argument. You can make that argument.

MR. RICHMAN: It's argument and it's opinion. He's a fact witness.

MR. EATON: I'll rephrase the question.

In fact, I'll withdraw the question.

MR. RICHMAN: Better.

BY MR. EATON:

ARBITRATION

Q Can you describe the process of what happens at Segal with respect to this Fund of when an employer requests withdrawal liability estimates?

A The request is usually made to the Fund office. The Fund office would make that request to us. We, in turn, would send out one of the exhibits you referred to earlier in terms of data request for the information needed to do the withdrawal liability.

We would prepare a memorandum and/or a report advising what the withdrawal liability is for that particular employer and return it to the Fund.

Q And if an employer in its request for withdrawal liability estimate also asks for a payment schedule, do you include a payment schedule?

A If they request that of the Fund and the Fund requests that of us, we would give them the payment schedule, yes.

Q Let's look at Exhibit 3.

This is an estimate for a complete

ARBITRATION
withdrawal; is that correct?
A Yes.
Q And it includes information about a total withdrawal liability of approximately $38 million.
Do you see that?
A Yes.
Q And it includes information about a payment schedule; is that right?
A Yes.
Q And attached to this letter is something called a Report on Employer Withdrawal Liability for the withdrawal in the year ended May 31, 2013.
Do you see that?
A Yes.
Q And this is a 16-page report that, is it fair to say, lays out in some detail how the Fund calculated the estimate?
A How the Segal Company --
Q How the Segal Company calculated the estimate?
A Yes.
Q It describes the assumptions used;

ARBITRATION
is that right?
A Correct.
Q It calculates the liability under two different methods?
A Yes.
Q And it breaks down the calculations year by year; is that right?
A Yes.
Q If you could turn to Page 15 of the report which is FUND-609.
A Yes.
Q And it provides information about a payment schedule, right?
A Yes.
Q And if you turn the page to 16, does it lay out the information used to calculate the payment schedule?
A Yes. Contribution.
Q And the payment schedule was calculated using wages; is that right?
A I believe so.
Q And you sent this document to the Fund?
A Yes.

ARBITRATION
Q And was it your understanding that the Fund sent this to The New York Times?
A I can't answer that.
Q If you could look at Exhibit 15, please.
And this is a letter from you to the Fund regarding withdrawal liability calculations; is that right?
A Yes.
Q And the date on this letter is March 11, 2009?
A Correct.
Q And you write, "In order to complete the request for a calculation of withdrawal liability in the plan year ending May 31, 2009 for The New York Times, we will need the following information from the Fund office."
Do you see that?
A Yes.
Q And one of the things you request is Number 2, "Total base units shifts/hours."
Do you see that?

ARBITRATION
A Yes.
Q And why did you request shifts/hours?
A We usually request that in order to determine the payment schedule.
Q And what's your understanding of what shifts/hours represent?
A The base units.
Q Is it your understanding that shifts are the base units for this Fund?
A Yes.
Q Is it your understanding that hours are the base units for this Fund?
A With this Fund, it's shifts. It should be based on shifts.
Q Why are hours listed on this letter?
A I don't know.
Q You drafted the letter, right?
A Yes.
Q Did you ever get a response from the Fund about this letter?
A Specifically, I don't recall.
Q Do you use this form letter that's

ARBITRATION

Exhibit 15 to request information from other funds which are your clients?

A Typically, yes.

Q So you don't recall one way or the other whether you actually calculated a withdrawal liability estimate as a result of this letter you sent to the Fund?

A If we did a calculation for the period ended 2009, then we would have gotten information from them.

Do I recall if we did a calculation? Yeah, I don't recall if we did one. If you have one, then we would have done it and gotten information to do so.

ARBITRATOR IRVINGS: Let me ask you this, and I hate to do this, but --

MR. RICHMAN: I have recross, too.

ARBITRATOR IRVINGS: So what we're going to have to do is we are not going to finish in the next day, and I understand you can't come the next day we have, but we'll just have

ARBITRATION

to have him back because I don't want to cut off your cross examination. You are entitled to whatever time you need. And you are entitled to direct. But I certainly gave prewarning --

MR. RICHMAN: That, you did.

ARBITRATOR IRVINGS: -- from yesterday that that's the limit that I have today.

MR. RICHMAN: Can we try -- let's go off the record for a second.

MR. MILLER: We are concluding for the day.

(Whereupon, the proceedings were adjourned at 3:58 p.m.)

ARBITRATION

INDEX

ARBITRATION

CERTIFICATE

STATE OF NEW YORK)
: ss.
COUNTY OF NEW YORK)

I, BARBARA R. ZELTMAN, Shorthand Reporter and Notary Public, within and for the State of New York, do hereby certify:

That this transcript is a true record of the proceedings had.

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 18th day of February, 2015.

BARBARA R. ZELTMAN
Court Reporter and Notary Public

ARBITRATION - VOLUME III

AMERICAN ARBITRATION ASSOCIATION

---------------------------------------X

THE NEW YORK TIMES COMPANY,

Petitioner,

v.

NEWSPAPER and MAIL DELIVERERS'-PUBLISHERS' PENSION FUND,

Claimant.

---------------------------------------X

ARBITRATION

VOLUME III

DAY 3

New York, New York

Tuesday, February 24, 2015

REPORTED BY: BARBARA R. ZELTMAN

Professional Stenographic Reporter

Job Number: 90059

ARBITRATION - VOLUME III

February 24, 2015
9:07 a.m.

Arbitration proceedings held at American Arbitration Association, 120 Broadway, New York, New York, before BARBARA R. ZELTMAN, a Professional Stenographic Reporter and Notary Public within and for the State of New York.

ARBITRATION - VOLUME III
A P P E A R A N C E S:

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MAX GARFIELD, ESQ.
ADAM GARTNER, ESQ.

(Cont'd)

ARBITRATION - VOLUME III
A P P E A R A N C E S: (Cont'd)

ALSO PRESENT:
Ethan Kra,
Ann Koski, Segal
Jeff Zomper
Darren French
Thomas Bentvena
Charles Setteducato

ARBITRATION - VOLUME III
ARBITRATOR IRVINGS: Okay. You are still under oath.
MR. MILLER: On the record.
ARBITRATOR IRVINGS: On the record.
ROSANA EGAN,
having been previously duly sworn by Arbitrator Irvings, was examined and testified as follows:
CONTINUED DIRECT EXAMINATION BY MR. MILLER:
Q Good morning, Ms. Egan.
A Good morning.
Q I'm just going to jump right in where we left off nearly two weeks ago.
One of your roles as the Fund's enrolled actuary is to prepare an annual Actuarial Valuation Report, correct?
A Yes.
Q And for how many years have you been doing that for the Fund?
A Since the mid '90s, approximately.
Q And one of the purposes of an annual Actuarial Valuation Report is to establish the funding requirements for the

current year, correct?
A Yes.
Q And does it also -- the Actuarial Valuation Report include information that is required to be filed with the annual Form 5500?
A Yes. Some of the information there is used for the 5500.
Q It's incorporated into --
A Schedule B/MB for the 5500.
Q Okay.
Ms. Egan, can you turn your attention to the white binder in front of you, Exhibit 25.
A Okay.
Q And what is that document?
A It's the actuarial valuation as of June 2011.
Q And this is the Actuarial Valuation Report for the Newspaper and Mail Deliverers'-Publishers' Pension Fund, correct?
A Yes.
Q And did you prepare this report?

A Yes.
Q Let me direct your attention to the page that is labeled SEGAL-000606.
A Okay. I'm there.
Q And this page is entitled Certificate of Actuarial Valuation.
A Yes.
Q And what is a Certificate of Actuarial Valuation?
A It basically lays out the different liabilities and assets for the valuation of the year.
Q And your name appears at the bottom of this certification; is that correct?
A Yes.
Q Turn to the very next page, which is essentially a table of Certificate Contents.
Am I correct that the eight exhibits and the information contained in those exhibits that is listed on this next page are part of the Certificate of Actuarial Valuation?
A Yes.

Q And the information contained in those eight exhibits in fact comprises the Certificate of Actuarial Valuation?
A Yes.
Q And you are in fact certifying to the accuracy of the information contained on those exhibits, correct?
A Yes.
Q Let's go back to the certificate page. And let me draw your attention to the last paragraph and the sentence, the second sentence which states, "To the best of my knowledge, the information supplied in this actuarial valuation is complete and accurate except as noted in Exhibit 1."
Do you see that sentence?
A Yes.
Q Is it fair to say that you personally are certifying to the accuracy of the information that's contained in this Certificate of Actuarial Valuation?
A To the reasonableness of the accuracy.
Q You, personally, are certifying to

the reasonableness of the information?
A We are given some information to do the numbers, and we don't audit that information but we look at it for reasonableness. So the information that goes in, we see that it's reasonable and then come up with our numbers.
Q At the time you prepared this certificate in Exhibit 25, did you believe that the information contained in this certificate was accurate to the best of your knowledge?
A Yes.
Q Do you still believe that?
A Yes.
Q Now, let me direct your attention to the page that's been labeled SEGAL-000628.
Are you there?
A Yes.
Q Okay. And you'll see that there's a definition of "contribution rate" in the middle of that page.
A Yes.

ARBITRATION - VOLUME III
Q Does that definition of contribution rate make any mention of shifts?
A There, no.
Q Does it make any mention of employees' per-shift wage rates?
A No. Wait. Can you say that again?
Q Yes. Does it make any mention of employees per shift wage rates?
A It says "8 percent of the wages."
Q It does not say "8 percent of employees' per-shift wage rates," correct?
A It doesn't use those words.
Q Thank you.
Is this description of contribution rate, in your judgment, accurate?
A Yes.
Q Rather than walk through each of the annual actuarial valuation certifications and annual valuation reports, let me just ask you this question: Did the actuarial valuation reports' certificates that you prepared prior to this valuation report as of June 1, 2011 describe the

ARBITRATION - VOLUME III
contribution rate using these same general words?
A I don't remember. "Before." When you say "before," within the last 15 years, 20 years?
Q Well, why don't we quickly do this.
MR. RICHMAN: Can I be helpful here? They say what they say.
MR. MILLER: Well, but it's my examination.
MR. RICHMAN: It is your examination. I'm trying to be helpful.
MR. MILLER: That's all right. Thank you.
BY MR. MILLER:
Q Why don't we quickly turn to Exhibit 20. And why don't you turn to the last page of that exhibit which also contains a description of contribution rate.
Do you see that?
A Yes.
Q And this Actuarial Valuation Report is for the year as of June 1, 2006; is that

ARBITRATION - VOLUME III
correct?
A Yes.
Q And the description that's used for contribution rate uses the same description as the one that we just reviewed for the actuarial report for 2011; isn't that correct? Last page.
A Similar, yes.
Q And similar in the sense that it describes the contribution rate as a percentage of wages, correct?
A Yes.
Q Thank you.
So at least as far back as 2006's actuarial valuation report, you were describing the contribution rate in the form of a percent of wages, correct?
A Assuming the ones in between the two are the same, yes.
Q The description of the contribution rate that's contained in these actuarial valuation reports, they were included in the corresponding Form 5500 for the relevant plan year, correct?

ARBITRATION - VOLUME III
A Usually the pieces of the certificate are attached to the Form 5500.
Q Including that piece of the certificate that contained the description of contribution rate, correct?
A I would think so.
Q Do you believe that persons who reviewed those Form 5500s could reasonably rely upon the information that you certified to and was contained in those Form 5500s?
MR. RICHMAN: Objection.
ARBITRATOR IRVINGS: Sustained.
MR. MILLER: Withdraw the question.
BY MR. MILLER:
Q Ms. Egan, why don't you turn your attention to Exhibit 27, also in the white binder.
And, Ms. Egan, this is the Pension Fund's Actuarial Valuation Report as of June 1, 2013; is that correct?
A Yes.
Q And did you prepare this report?
A Yes.

Q And is this actuarial valuation analogous to the two that we just examined in terms of its overall purpose?
A Yes.
Q Let me direct your attention again to the final page which labeled 000760.
And please review the description there respecting contribution rate.
A Okay.
Q Did you draft this language?
A I possibly could have. I don't remember exactly who did. A couple people work on the valuation, so it could have been someone else, but I reviewed it.
Q You did review it?
A Yes.
Q And you did certify to it in the Certificate of Actuarial Valuation, correct?
A Yes.
Q And this is not the same language that was used to describe the contribution rate in the prior valuations that we looked at, right?
A Correct.

Q In fact, this description omits use of the word "wages," doesn't it?
A Yes.
Q And this language does use the word "shift," right?
A "Shift rate."
Q That's right. "Shift rate."
Do you believe that the language that you previously used, "8 percent of wages," means the same thing as "8 percent of the shift rate per shift"?
A Yes.
Q And why is that?
A Because the shift rate is the wage in this situation.
Q Are you aware whether employees that are covered by this Pension Fund are compensated for holidays?
A I'm not sure exactly what they're compensated for.
Q To the extent that they were paid for holidays, that would be wages for something other than a shift worked, correct?

MR. RICHMAN: Objection. She is not sure what they're compensated for. I don't think she should be going down this road. She's a fact witness, not providing opinions.
ARBITRATOR IRVINGS: You can have the question. It's going toward terminology that she used.
MR. MILLER: Exactly right.
(Requested portion of record read:
"Q. To the extent that they were paid for holidays, that would be wages for something other than a shift worked, correct?")
(End of read-back.)
A I'm not sure how they measure the holidays, if they measure it by shifts or they could say a holiday is one shift. I'm not sure how they measure holidays.
Q I'll make my question simpler.
When somebody is out on a holiday, they do not work a shift, correct?
A It's my understanding -- I would think not.

Q If somebody is out on military leave and is compensated for military leave, they are not working a shift, correct?
A I would think not.
Q And if somebody is out on Workers' Compensation and still receives payments from their employer, they are not working a shift, correct?
A I would think not.
Q So assuming that in all of those instances, the covered employee of the Fund is not working a shift, is it still your view that wages equal shift rate per shift?
A We were describing the contribution rate, and it was my understanding that it's a percentage of the wage rate.
Q Why did you substitute the words "shift rate per shift" for the word "wages" in this 2013 Actuarial Valuation Report?
A To make it clearer.
Q And is that because the previous use of the word "wages" made it unclear?
A It could have made it unclear for those who maybe are not familiar with the

ARBITRATION - VOLUME III
Fund.
Those involved in the Fund knew how the contributions were made.
Q But for those not working at the Fund, the prior language, in your judgment, was unclear?
A Could have been unclear. It was clear to me, but could have been unclear to someone else.
Q Did you consult with anyone at the Fund before changing this language from "8 percent of wages" to "8 percent of shift rate per shift"?
A No. We're always tweaking language in the reports.
MR. RICHMAN: Just answer the question.
THE WITNESS: Oh, sorry.
BY MR. MILLER:
Q Did you consult with Segal's in-house counsel before changing the language?
A No.
Q Let's turn to the second page of

ARBITRATION - VOLUME III
this report.
That contains the cover letter, correct?
A Yes.
Q And the cover letter is dated February 7, 2014, correct?
A Yes.
Q So you drafted this revised language after The New York Times was assessed withdrawal liability in this case, correct?
A Yes.
Q And you drafted this revised language after The New York Times had challenged the withdrawal liability assessment in this case, correct?
A Yes.
Q And I take it that your testimony is, nonetheless, you just suddenly decided to revise this language, correct?
MR. RICHMAN: Objection. "Suddenly decided to."
ARBITRATOR IRVINGS: It's cross examination.

ARBITRATION - VOLUME III
Go ahead.
MR. MILLER: Can you repeat the question.
(Requested portion of record read:
"Q. And I take it that your testimony is, nonetheless, you just suddenly decided to revise this language, correct?")
(End of read-back.)
A Thinking it over as we were doing the valuation, it appeared it was unclear, so we thought we should make it clearer.
Q Let's go back to the last page of the document and the description of contribution rate.
I'd like you to focus on this revised articulation of the description.
In this description, what is the contribution rate?
A Eight percent of the shift rate.
Q And so the words in this formulation "per shift," they represent your understanding of contribution base units, correct?

ARBITRATION - VOLUME III
A Yes.
Q So this formulation, 8 percent of the shift rate per shift, is actually the entire contribution formula. It represents both the contribution rate and the expression of the CBUs, correct?
A Yes.
Q So, similarly, when the prior valuation reports use the formulation 8 percent of wages, the word "8 percent" represented the contribution rate and "wages" represented the base units, correct?
A No.
Q Why?
A It was 8 percent of wages. That's how we would describe the contribution rate any time we talked about it. And everyone knew that you meant the wage rate.
But that's how it was described all the time. It was the way people spoke about it.
The language change was to make it clearer because it didn't appear to be clear, just like you are making it not

ARBITRATION - VOLUME III

clear.

Anyone in the room knew that the contribution rate was 8 percent of the wage rate.

Q What room would that be?

A Where you talked about -- the people who saw the valuation, where you talked about the valuation.

Q So among the people who talked about the valuation, they understood?

A Yes.

Q So in the 2013 Actuarial Valuation Report, what you have expressed under Contribution Rate is, in your judgment, the entire contribution formula, but in the earlier versions, you were not expressing the entire contribution formula?

A Technically, yes.

Q Let's turn our attention -- sticking with this document, SEGAL-000721.

And you see the last sentence on that page?

A Yes.

Q That last sentence says, "The

ARBITRATION - VOLUME III

contribution rate is unchanged from that reflected in our prior valuation of 8 percent of the shift rate per shift."

Do you see that?

A Yes.

Q But to confirm, the prior valuation report's description of the contribution rate did not use the language about shift rate, did it?

A Correct.

Q Nor did it use the word "shift" at all?

A Correct.

Q And, in fact, you just testified that this expression "8 percent of the shift rate per shift" is the entire contribution formula. And in the earlier versions, you did not express the entire contribution formula.

A This sentence is to compare what the projected contributions are based on, and we were basically just saying that it's still on allocation of 8 percent of the wages. That's all that sentence is about.

ARBITRATION - VOLUME III

Q That's not quite what I asked you.

What I asked you was to confirm that in use of the phrase "8 percent of the shift rate per shift," you were expressing what you thought was the entire contribution formula. And in the earlier versions, you were not expressing the entire contribution formula.

Yes or no?

A Yes.

Q So why did you say here that the contribution rate is unchanged?

A Again, the contribution rate didn't change. It's the same way that we described it in the last page. We were trying to be clearer about it. To be clearer.

Q Except that in the earlier versions, you weren't expressing the contribution formula, correct?

ARBITRATOR IRVINGS: That point's been made.

Let's move on.

MR. MILLER: Fine.

MR. RICHMAN: Thank you.

ARBITRATION - VOLUME III

BY MR. MILLER:

Q Can you turn your attention -- sticking with the white binder -- to Exhibit 5.

Take a moment to review that document, please. Thank you.

A Okay.

Q What is this document?

A It looks like it's a notice to the bargaining parties about the funding improvement plan schedules.

Q Ms. Egan, have you seen this document before?

A I think I've only seen it at the deposition. I don't think I've seen it before then.

Q But didn't you review this notice before it was finalized?

A I don't know that I reviewed the notice. I might have reviewed the attachments. The Exhibits 1 and 2 were part of what was completed for the funding improvement plan, which might have been attached to this.

Page 526

ARBITRATION - VOLUME III
I don't remember this first page. I don't know.
Q Take a look at Exhibit 1 and 2 of this document there entitled Alternative Schedule and Default Schedule.
Were you asked by the NMDU Fund to review these schedules that are attached to this document?
A I think it's part of the funding improvement plan. I think I was.
Q Have you ever heard of the term "yellow zone status"?
A Yes.
Q And have you ever heard of the term "endangered status"?
A Yes.
Q And what does the term "endangered status" mean?
A The Pension Protection Act lays out -- under the Pension Protection Act, one is to measure the status of the plan every year. And if you hit certain triggers, you are considered in endangered status.
Q And am I correct that in connection

Page 527

ARBITRATION - VOLUME III
with the plan year that commenced on June 1, 2012, you as the enrolled actuary certified that this Fund was in endangered status?
A I think in 2012, yes.
Q And as a consequence of your certification, the Fund had to develop a funding improvement plan, correct?
A Yes.
Q And that funding improvement plan needed to have certain funding commitments that would allow the Pension Fund to exit from endangered status, correct?
A Or to hit certain triggers, to hit a certain target, I should say, at the end of a period.
Q Okay.
And you, in fact, advised the Fund and helped the Fund to develop its funding improvement plan, correct?
A We prepared projections for them to assist them in developing a funding improvement plan.
Q And those projections included projections about necessary contributions to

Page 528

ARBITRATION - VOLUME III
meet the benchmark?
A Yes.
Q And in fact, the Pension Fund here did adopt a funding improvement plan, correct?
A Yes.
Q And this document here is the notice to the collective bargaining parties that, among other things, sets forth the contribution schedules in connection with that adopted funding improvement plan, correct?
MR. RICHMAN: Can you specify which document you're talking about? Are you talking about the exhibits or the first page?
MR. MILLER: I'm talking about the entirety of the document, the notice and the attachments to the notice, which are the schedules.
A It reads that way, yes.
Q And the collective bargaining parties would include the employer contributors and the Union, correct?

Page 529

ARBITRATION - VOLUME III
A I would think so.
Q Do you have any reason to believe otherwise?
A No.
Q Let's turn your attention to the second page of this document which is Exhibit 1 entitled Alternative Schedule.
And how does Paragraph 2 of this Alternative Schedule describe the employer contributions that would take effect under this Alternative Schedule?
A It basically says that the 8 percent allocation would become 11.8 percent.
Q And it says "11.8 percent of wages"?
A Yes.
Q It does not mention anything about shifts, correct?
A No.
Q Or about pay rates per shift?
A It implies, again like the other one, the 11.8 percent of wages means the 11 percent of the wage rate.

ARBITRATION - VOLUME III
Q At least to the group of individuals who would review the actuarial report, correct?
A To anyone -- my understanding is everyone talks about it that way, and that's how it was characterized.
Q Do you know whether any employers talked about it that way?
A I have no idea. Well, some of them. Some of them are trustees, so I'm sure they did.
Q But you don't know, one way or the other?
A I don't know each individual person, no.
Q And I think, speaking of trustees, that you just testified that you in fact advised the trustees regarding the contribution levels that would be required under these two schedules, correct?
A We prepared projections where they included these final numbers.
Q So these final numbers were based on projections that were undertaken by your

ARBITRATION - VOLUME III
team at Segal?
A Yes.
Q And in undertaking those projections of future employer contributions, did you do that on the basis of percentage of wages or on the basis of shifts?
A The way we projected contributions was neither. We did not have the information on shifts or wages to do projections on contributions.
We would use information on the prior historical contributions and make adjustments to those to project contributions.
Q I'm going to switch gears now and talk a little bit about withdrawal liability estimates.
In your practice, do you prepare estimates of employers' potential withdrawal liability?
A For any fund or --
Q Let's take it generally for any fund first.

ARBITRATION - VOLUME III
For any of the funds that you served, is it customary for you to prepare estimates of employers' potential withdrawal liability?
A We have prepared, yes.
Q And in connection with this Fund here, the NMDU Fund, as I'll call it, did you prepare estimates of employers' potential withdrawal liability?
A Yes.
Q And isn't it true that ERISA, the federal pension law, provides an employer with a right to obtain an estimate of withdrawal liability upon request?
A Yes.
Q And isn't it also true that ERISA requires that, if an employer has requested an estimate of withdrawal liability, that request needs to be responded to within six months?
MR. RICHMAN: Objection. Can you give us a time frame?
Q For the last several years, hasn't it been the case that ERISA has required

ARBITRATION - VOLUME III
that if an employer has requested an estimate of withdrawal liability, the request needs to be responded to within six months?
ARBITRATOR IRVINGS: How about give me a year.
MR. MILLER: Okay.
Q Since, say, 2009.
A I'm not sure exactly of the six-month period.
Q Well, the law will speak for itself.
MR. RICHMAN: There we go.
Q Now, I want to talk a little bit about not estimates of withdrawal liability but actual calculations of withdrawal liability.
ERISA sets forth rules for how a withdrawal liability amount must be amortized, correct?
A Yes.
Q And ERISA provides that in the normal course, withdrawal liability amounts are to be amortized through quarterly

payments, correct?
A Yes.
Q And can you summarize for me how the quarterly payment amount is calculated?
A Based on the date of withdrawal, you look back ten years at the contribution base units and calculate the average three-year highest base units. And in the ten years prior to the date of withdrawal, the actual withdrawal date, you use the highest contribution rate.
And the annual payment is the highest base units times the highest contribution rate, highest average base units times contribution rate.
Q And you would divide that number by four to get your quarterly payment amount, correct?
A Correct.
Q So am I correct that CBU information is crucial in preparing a payment schedule?
A Yes.
Q Now back to preparing estimates of

withdrawal liability.
When preparing an estimate of withdrawal liability, that estimate should also include a payment schedule if the employer requests one, correct?
A Yes.
Q So in order for you to calculate a withdrawal liability estimate with a payment schedule, you would need CBU information and contribution rate information, correct?
A Yes.
Q By the way, are employers allowed, at their discretion, to pay their withdrawal liability in a lump sum?
A I think the law allows you to pay it upfront. I know you can settle a lump-sum payment.
Q The payment schedule to amortize withdrawal liability may be as long as 20 years, correct?
A At most, 20 years, under a regular withdrawal.
Q So is it often the case that withdrawal liability assessments, if not

paid off in a lump sum, create long-term debt obligations of the withdrawing employer to the fund?
MR. RICHMAN: Objection. I'm not -- can you maybe just repeat the question.
MR. MILLER: What's the objection?
MR. RICHMAN: I didn't understand the question.
MR. MILLER: But the witness may have understood the question.
THE WITNESS: Can you repeat the question.
MR. RICHMAN: Maybe she didn't.
BY MR. MILLER:
Q Is it often the case that withdrawal liability assessments, if not paid off in a lump sum, create a long-term debt obligation of the withdrawing employer to the fund?
MR. RICHMAN: Objection. The witness is a fact witness, not offering opinions.

MR. MILLER: I'm asking for her experience as an actuary to nearly 50 multiemployer plans whether, based on the withdrawal liability assessments she has calculated, it is often the case that it results in a long-term amortization period.
MR. RICHMAN: That is a request for an expert opinion. It is not a fact.
She is a fact witness.
ARBITRATOR IRVINGS: Let me ask: Are you disputing that if there is a liability payment schedule, that there's then an obligation?
MR. RICHMAN: I don't know -- we're going into opinion testimony. Is it often the case? I don't know, how often is "often"?
ARBITRATOR IRVINGS: Okay.
MR. MILLER: I'll just make the point that lay witnesses are often asked to give their opinion based on experience.

ARBITRATION - VOLUME III

ARBITRATOR IRVINGS: But where are we going with this?

MR. MILLER: I simply would like her, Ms. Egan, to confirm that based on her experience the withdrawal liability payment schedules may result in long-term obligations of the withdrawing employer.

ARBITRATOR IRVINGS: As long as 20 years. Yes?

BY MR. MILLER:

Q Yes?

A The most, 20 years.

Q Okay.

MR. MILLER: Then I'll move on.

A Not necessarily it could be one year. Maybe it could be one year. It doesn't have to be 20 years. That's the maximum.

Q Let me focus on estimates of withdrawal liability that you have made in connection with the Pension Fund here.

I think you did testify a moment

ARBITRATION - VOLUME III

ago that in fact you have prepared estimates of withdrawal liability when requested by employers in connection with this Fund?

A Yes.

Q And can you summarize for us the process that you employed when asked to prepare an estimate?

ARBITRATOR IRVINGS: For this Fund?

MR. MILLER: For this Fund, yes.

A We asked for the data needed and then we prepared the calculation.

Q And in the ordinary course, what data would you request from the Fund?

A The obligated contribution history of the employer and any information needed to set up the pools, if they have them set up, the current pool.

Each year you're setting up a pool.

Q Ms. Egan, let me draw your attention to Exhibit 14 again in that white binder.

This is a letter dated January 22,

ARBITRATION - VOLUME III

2009 from R. Anthony Benton of The New York Times to the Pension Fund.

And you'll see that it is regarding Pension Fund and withdrawal liability estimates.

Have you ever seen this document?

A I don't know that I -- I don't think I've seen this.

Q Let me quickly draw your attention to Paragraph 4.

And Paragraph 4 requests an estimate of New York Times' withdrawal liability and then certain additional backup worksheets.

Do you ever recall performing the calculations that were requested by The New York Times in this letter and, in particular, Paragraph 4's request?

A I know we've prepared a couple of estimates for The New York Times. I don't know if it was this particular request.

Q Okay.

Are you aware that the Segal Company received a Subpoena requesting

ARBITRATION - VOLUME III

documents in this case?

A Yes.

Q And are you aware that Segal in fact produced documents in this case?

A Yes.

Q Do you have any reason to believe that if you had prepared a withdrawal liability estimate with backup in 2009, it would not have been produced by Segal?

A Say that again.

Q Do you have any reason to believe that if you had prepared the withdrawal liability estimate that is requested in this letter and the backup, it would not have been in the production that Segal made in this case?

A If we found it, we would have produced it.

Q Thank you.

Now I'd like to have you turn your attention to Exhibit 56. Again, I think it's in the same binder.

No, I'm sorry. The second binder. It should be in the red binder.

ARBITRATION - VOLUME III

And, again, that's Exhibit 56.

And Ms. Egan, this document staples together several letters, so let me just ask you to draw your attention to the second page of this document which has the stamp at the bottom NYT-001963.

A 1963, okay.

Q Do you see that at the bottom.

Why don't you take a moment and take a look at that letter.

A Okay.

Q So this appears to be another request by The New York Times for an estimate of withdrawal liability including CBU information which is requested in Paragraph 2.

A Okay.

Q And are you familiar with this letter?

A No.

Q Do you recall having prepared an estimate of The New York Times' withdrawal liability in response to this letter?

A I don't recall preparing. I know

ARBITRATION - VOLUME III

we did a couple of them but I thought it was later.

Q And I take it that if a request -- strike that.

I take it that if you had prepared an estimate in response to this request and it was in Segal's files, you would have -- Segal would have produced it in this case?

A Yes. If we had it. If we could find it.

Q I'm sorry. Now I need you to turn your attention back to the white binder and Exhibit 4.

This should be a letter dated August 15, 2011, again to the Fund, from a man named James Dexter.

Do you recall seeing this letter?

A They all look alike after a while.

I don't remember. I don't remember if I've seen this letter.

Q Now sticking with this white binder, why don't you just go ahead and move to Exhibit 18.

A Okay.

ARBITRATION - VOLUME III

Q Exhibit 18 is a memorandum from you and Mr. Urbank to the Fund director of the NMDU Fund, Mr. Schwartz, dated June 25, 2012, correct?

A Yes.

Q And attached to this letter is an estimate of withdrawal liability for The New York Times for withdrawal in the year ended May 31, 2012, correct?

A Yes.

Q Did you prepare the report that is attached to the memorandum?

A Yes.

Q And if you turn your attention to Page 15 of the report, which has a label entitled SEGAL-000032, you'll see there is a payment schedule that you calculated in connection with this estimate of withdrawal liability.

Do you see that?

A Yes.

Q And you calculated a payment of roughly 952,000 per quarter in connection with this withdrawal liability estimate,

ARBITRATION - VOLUME III

correct?

A Yes.

Q And now I'd like to draw your attention to the next page, Page 16.

And what I'd like to do is explore with you how you came up with that quarterly payment amount of roughly $952,000.

A Sorry?

Q So I'd like to explore with you how you calculated that number.

A Oh, okay. Okay.

Q So under the heading Contribution Rates, you'll see that there are a variety of percentages that are listed.

And then under the heading Effective Date, it indicates roughly a ten-year period from July 1, '99 through January 1, 2009, correct?

A Yes.

Q And the highest contribution rate listed there is 8 percent, correct?

A Eight percent of wage.

Q And then under the column Total Wages for The New York Times, there are

ARBITRATION - VOLUME III
ten years' worth of wages listed in that column, correct?
A Yes.
Q And the three consecutive years that are the highest would be for the years 2003, '4 and '5, correct?
A Yes.
Q So am I correct that the way you did the math was to take the average for the high three-year period of total wages, multiply that by 8 percent and divide by 4?
A That's how we estimated it.
Q Right. And that's how you came up with roughly $952,000 per quarter, correct?
A That's how it was estimated.
Q But the answer to my question is yes, correct?
A Yes.
Q That's how you did the math, correct?
A Yes.
Q Thank you.
So if the mathematical allocation was 8 percent times the high of the three

ARBITRATION - VOLUME III
consecutive years of wages, then the contribution rate that you used in making this calculation was 8 percent, correct?
A It was an estimation.
Q That's not my question.
In doing the math, the contribution rate that you used was 8 percent, correct?
A That was a piece of what was used to come up with the payment.
Q And that 8 percent piece was the contribution rate piece, correct? Yes or no?
A It was a way to get to an annual payment.
Q But you previously testified that in determining a payment schedule you need a contribution rate, correct?
A But this was an estimated annual payment.
Q And you estimated an annual payment of $952,000, correct?
A Yes.
Q And in undertaking the math for that estimate, you used 8 percent --

ARBITRATION - VOLUME III
A We multiplied one number times another number to get to an estimated annual payment.
Q And the contribution rate number that you used was 8 percent, correct?
A We used -- didn't necessarily represent the contribution rate, but it represented -- it was a way to get to an annual payment.
Q And the number 8 percent, that's under what heading?
A Eight percent of wages is under Contribution Rate.
Q The term "8 percent" is under the heading Contribution Rate, correct?
A The term "8 percent of wages" is under the heading Contribution Rate.
Q In preparing this mathematical allocation of quarterly payments, did you use for any purpose the total number of shifts worked by New York Times employees?
A No. But it's embedded in the numbers.
Q On this page, there is no shift

ARBITRATION - VOLUME III
data, correct?
A No.
Q Thank you.
A Not directly.
Q Just answer yes-or-no questions "Yes" or "No." Other lawyers will have an opportunity to ask you questions.
A Sorry.
MR. RICHMAN: That's not fair.
ARBITRATOR IRVINGS: But it's the rules, so we'll live with it.
MR. MILLER: Correct. It is the rules.
ARBITRATOR IRVINGS: All right. Let's move on.
BY MR. MILLER:
Q For purposes of this mathematical allocation, total wages functioned as CBUs; isn't that right?
A Like I said before, we were trying to get to an annual payment, and we multiplied one number by the other to try to simulate an annual payment, whether it functioned as one thing or another.

ARBITRATION - VOLUME III

Q Let me ask the question another way.

Am I correct that in order to estimate a payment schedule, you need CBU information? You previously testified to that, correct?

A You need CBU and contribution rate information.

Q And in connection with this calculation, total wages played the role of CBUs, correct?

A As an estimate.

Q I know it's an estimate.

But in this calculation -- answer my question: In this calculation, total wages played the role of CBUs, correct? Yes or no?

A I'm not sure how to explain this.

THE WITNESS: Can I explain or do I have to say yes or no?

ARBITRATOR IRVINGS: You have to say yes or no.

Ron will ask you to explain.

A It's hard when it's not a yes or no

ARBITRATION - VOLUME III

answer.

It looks like it played that role, but, indirectly, it wasn't.

Q So essentially, your answer is yes, total wages played the role of CBUs, correct?

I'm just looking for a yes or no answer.

A It looks that way.

Q Thank you.

Did you anywhere in this document indicate your view that shifts are CBUs?

A No.

Q Did you indicate anywhere in this document that CBUs are not total wages?

A No.

Q So it would have been reasonable for a reader of this payment schedule to conclude that CBUs are total wages, correct?

MR. RICHMAN: Objection.

ARBITRATOR IRVINGS: Sustained. You can argue it.

BY MR. MILLER:

Q Let's turn to the note at the

ARBITRATION - VOLUME III

bottom of this page.

The note says that "Contributions and contribution rate information for The New York Times was received from the Fund office."

And right above that note is that column, that vertical column entitled Contribution Rates.

Do you see that?

A Yes.

Q And the contribution rate information that's under that column, that was received from the Fund office, correct?

A The allocation of the rate, yes. The 6 percent, the 8 percent.

Q That was received from the Fund office, correct? Yes or no?

A Yes.

Q Now I'd like to turn your attention to Exhibit 3.

And why don't you take a moment to review that document.

A Okay.

Q And are you familiar with the cover

ARBITRATION - VOLUME III

memorandum and the estimate that's attached to that document?

A Yes.

Q And this is a similar estimate of withdrawal liability that you prepared for The New York Times in July of 2013, correct?

A Yes.

Q And if you turn your attention to Page 15 of this exhibit, which is labeled FUND-0000609, you see again there is a payment schedule that's set forth, correct?

A Yes.

Q And this payment schedule indicates a quarterly payment of approximately 952,000?

A Yes.

ARBITRATOR IRVINGS: Can we agree that the colloquy will be the same?

MR. MILLER: Yes. Let me ask that question to get it done.

BY MR. MILLER:

Q Is it fair to say that the last page of the document is structured just the

ARBITRATION - VOLUME III

same as the payment schedule analysis you prepared for the June 2012 estimate?
A Yes.
Q So am I correct that in the span of 13 months from June 2012 to July 2013, you used 8 percent as the contribution rate in preparing estimates of a payment schedule for withdrawal liability for The Times?
A At those two points in time, I did.
Q Thank you.
And in both instances, there's nothing to alert the reader that the contribution formula was not a percentage of wages, correct?
A It appears not.
Q And, similarly, there's nothing in the document alerting the reader that CBUs are not total wages, correct?
A Yes.
Q Now, can you turn your attention to Exhibit 1.
Take a moment to review that document, please.
A Okay.

ARBITRATION - VOLUME III

Q Can you identify this document?
A I don't know that I've seen this, this actual document.
Q Okay. But let me draw your attention to the portion of this document that's identified on the bottom right with the Bates stamp FUND-0000727.
Do you see that?
It's about midway through the document.
A Okay.
Q Are you familiar with this portion of the document, the calculation of withdrawal liability?
A Yes.
Q And you prepared this portion of the document, correct?
A Yes.
Q And as far as you are aware, this is the actual assessment of partial withdrawal liability that was made against The New York Times in this case?
A Yes. I think so.
Q And are you aware that the basis

ARBITRATION - VOLUME III

for this assessment of partial withdrawal liability was that CBUs had declined by more than 70 percent, correct?
A That's my understanding, yes.
Q And did you calculate a payment schedule in connection with this assessment?
A Yes.
Q And why don't you in that regard turn to FUND-0000743.
Page 16. Are you there?
A Yes.
Q And let's turn your attention to Roman Numeral VIII, the heading Payment Schedule for New York Times' Partial Withdrawal during Year Ended May 31, 2012.
Do you see that?
A Yes.
Q And this Section VIII sets forth the calculations that lead to your determination of the amount of the quarterly payment of being approximately $923,000, correct?
A Yes.
Q And as we discussed earlier, the

ARBITRATION - VOLUME III

formula that's mandated by ERISA to calculate a payment schedule depends on historical CBU levels and contribution rate, correct?
A Yes.
Q But here, you did not use wages for CBUs, did you?
A No.
Q Instead, you used shifts?
A Correct.
Q So quickly just to walk through the calculation, you took the average number of shifts over the high ten-year period prior to the plan year of withdrawal and multiplied that by $23.75. Then you multiplied that, I take it, by a partial withdrawal fraction and divided by 4?
A Yes.
Q And if you look at the final page of this document, which is FUND-0000757, I take it those are the historical shift numbers you used in the calculation?
A Yes.
Q Where did you obtain the shift

ARBITRATION - VOLUME III

numbers reflected on that page?
A From the Fund office.
Q And did you also receive from the Fund office that $23.75 figure you used in the calculations?
A Yes.
Q And you agree that you calculated this payment schedule differently from how you had done the estimates, the last one being less than 60 days earlier, correct?
A Yes.
Q Why did you change your approach?
A The first one was an estimate and we didn't have all the information to do it. And the second one was an actual calculation and we were able to get the information to do it.
Q So in connection with the earlier calculations, you were missing certain information that you needed and used in performing the payment schedule or calculating the payment schedule for the actual assessment, correct?
A That's my recollection.

ARBITRATION - VOLUME III

Q And do you recall what information you were missing?
A I believe we didn't have the contribution rate information.
Q You had the shift information, just not the shift rate information, correct?
A That's my recollection.
Q Can you turn your attention to Exhibit 42.
Ms. Egan, have you ever seen this cover e-mail and the attachments to it?
A Yes.
Q And, in fact, you're a recipient of this e-mail, correct?
A Yes.
Q Do you recall receiving this e-mail from Ms. Albergo, Barbara A., at the Fund office?
A Yes.
Q This e-mail also copies an oleary@kmm.com.
Who does that e-mail address belong to, if you are aware?
A That's one of the counsels of the

ARBITRATION - VOLUME III

NMDU.
Q And do you know why Ms. O'Leary was copied on the e-mail?
A I don't know why Barbara copied her.
Q And this e-mail indicates it was sent on July 31st, and this was two weeks after or roughly two weeks after you had completed the estimate of payment schedule using wages as CBUs, correct?
A Yes.
Q And, Ms. Egan, can you briefly describe the information that's attached to this e-mail?
A It's my understanding that the information shows the contribution rates to the Welfare Fund and the Pension Fund at different effective dates for the different types of shifts.
Q So this Pension Fund information, was this the information that you needed to calculate the payment schedule for the actual assessment?
A Yes.

ARBITRATION - VOLUME III

Q And had you previously asked for this information from the Fund in connection with the two prior estimates you calculated of withdrawal liability?
A My recollection is that we did.
Q So just to confirm, this is the information that you did not have in connection with those prior estimates that you prepared, correct?
A As far as I recall, yes.
Q In preparing calculations of withdrawal liability for employers of this Fund, do you typically receive this -- did you typically receive this kind of rate information?
A Not always. Not typically.
Q Can you think of any reason why it would have been difficult for the Fund office to have provided you these sheets at an earlier date?
A I have no idea what's difficult about it.
Q Let's focus on the first page of this rate information.

ARBITRATION - VOLUME III

This appears to be rate information for, it says in the first sentence, "day shifts of March 31, 2013."

Do you see that at the top?

A Yeah.

Q And am I correct that for the Pension Fund, eight different wage rates are depicted on this sheet?

A For The New York Times?

Q For The New York Times, correct.

A Yes, that's what I see is eight rates for the Pension Fund.

Q So is it your understanding that The New York Times has eight different contribution rates that applied to its pension obligations in any given year?

A That's my understanding by looking at this.

Q Thank you.

Are you aware whether employees who work shifts that might use specialized machinery, such as a forklift, are paid higher shift rates, shift wages than the rates listed on these sheets?

ARBITRATION - VOLUME III

A I have no idea.

Q To the extent that they are, there would be two additional contribution rates on top of the eight contribution rates applicable to The New York Times, correct?

A Why two? Why two?

Q Strike that. Let me rephrase the question.

To the extent that an employee who might use specialized machinery such as a forklift is paid a higher shift wage than the rates listed on this sheet, that would be an additional contribution rate applicable to The New York Times, correct?

A If that's how they make the contributions to the Fund, you would think so. I don't know otherwise.

Q You don't know one way or the other?

A Right.

Q Do you know whether there are any employees who participate in this Fund who are paid on a salary rather than a per-shift basis?

ARBITRATION - VOLUME III

A I have no idea.

Q To the extent that a person that is covered by this Fund were to be paid a salary rather than on a per-shift basis, does this rate sheet reflect the contributions for such a salaried individual?

A I have no idea.

Q Is there any information on this rate sheet that would advise the contributing employer how much to contribute for an employee who would be paid on a salary rather than on a per-shift basis?

A I don't see any information. I don't.

Q Thank you.

Is there a contribution rate on this sheet that reflects the appropriate contribution for an employee who might be out on Workers' Compensation?

A It doesn't appear that way. I'm not sure -- I didn't create this sheet, so I don't ...

Q But it's your testimony that it

ARBITRATION - VOLUME III

does not appear to be that way, correct?

A It doesn't specify.

Whether they need to use one of these rates, I wouldn't know.

Q Okay. Let's turn to a different subject. Let's talk about investment return assumptions.

Can you describe what an investment return assumption is as it relates to multiemployer pension plan funding?

A The investment return assumptions used for funding?

ARBITRATOR IRVINGS: Before we go into this new area, maybe we can take a five-minute break.

MR. RICHMAN: That was my suggestion.

(A brief recess was taken.)

MR. MILLER: Back on the record.

BY MR. MILLER:

Q Ms. Egan, let me just restate the question.

Page 566

ARBITRATION - VOLUME III

Can you describe what an investment return assumption is?

A That is used for funding valuations?

Q That's correct.

A It is an assumption that is used to reflect how money will -- how much you're expecting to receive on your return on your assets.

Q And these would be the assets at which the Pension Fund -- strike that.

These would be the investments that the Pension Fund has made with its assets, correct?

A Yes.

Q Do you know what investment return assumption you used for the NMDU Fund for funding purposes?

A Currently?

Q Yes.

A Seven and a half percent.

Q And how did you select that investment return assumption?

A Well, it's a long-term assumption

Page 567

ARBITRATION - VOLUME III

that's derived from looking at historical data and expected market -- current and recent market returns.

We use a building block approach where we reflect or take into account inflation expectations or any anticipated risk premiums on each of the asset classes in the portfolio.

We take into account the target asset allocation of the fund.

Q So I take it you are familiar with the term "building block approach" or "building block method," correct?

A Yes.

Q And is it fair to say that you applied the building block method in connection with the decision to use 7.5 percent as the investment return assumption for this Fund?

A Yes.

Q And is it fair to say that the building block method takes into account the Fund's actual assets and actual targeted asset allocation, correct?

Page 568

ARBITRATION - VOLUME III

A Yes.

Q And is it fair to say that the 7.5 percent assumption represents your best estimate of how the Pension Fund's assets here will on average perform over the long term?

A Over a long-term period, yes.

Q For ongoing regular funding purposes, you need to annually value a pension plan's liabilities as an enrolled actuary for a multiemployer plan, correct?

A Yes.

Q And a critical assumption in present valuing a pension plan's liabilities is the discount rate used to arrive at that present value, correct?

A Yes.

Q And, indeed, isn't that the most critical of the assumptions that an enrolled actuary applies in determining the present value of a pension fund's liabilities?

A If you mean critical, has the most effect on the liabilities, yes.

Q Thank you.

Page 569

ARBITRATION - VOLUME III

A In most cases.

Q And am I correct that for multiemployer pension plans for ongoing funding purposes, the plan's investment return assumption is used as the discount rate to present value liabilities?

A In most cases.

Q And did you in fact use the 7.5 percent investment return assumption for this Pension Fund to present value this Pension Fund's liabilities for ongoing funding purposes?

A Currently, yes.

Q And, indeed, you've done so for the last number of years, correct?

MR. RICHMAN: Objection.

What's the number of years?

BY MR. MILLER:

Q For how many years have you applied the Fund's investment return assumption as the discount rate to value the Fund's liabilities?

A Many years.

Q At least ten?

ARBITRATION - VOLUME III

A At least ten. For valuation purposes.

Q Can you recall any period during which you've been the enrolled actuary for this Fund in which you did not use the Fund's investment return assumption as the discount rate to value its liabilities?

A No. Off the top of my head, no.

Q And am I correct that that discount rate assumption, which is also the investment return assumption, has been reflected in the various annual Actuarial Valuation Reports that you've prepared for the Pension Fund over the years?

A Yes.

Q In that regard, let's turn our attention back to Exhibit 25 which is the Actuarial Valuation Report as of June 1, 2011.

So turning back to Exhibit 25, why don't you draw your attention to the page that's been marked SEGAL-0000621.

Are you on Page 000621?

A Yes.

ARBITRATION - VOLUME III

Q And you'll see toward the middle of the page there is a line that reads "Net investment return, 7.5 percent."

Do you see that?

A Yes.

Q And that 7.5 percent indeed memorializes that as the enrolled actuary for this Fund for this valuation report you're using 7.5 percent as the investment return assumption and discount rate, correct?

A Yes.

Q Actuarially, why does it make sense to use the plan's investment return assumption as the discount rate to present value liabilities for funding purposes?

A The liabilities are on a long-term basis, and the investment return, what you are expecting on your assets on a long-term basis, are similar, so it would make sense if they are, they would be the same.

Q Is it fair to say they're essentially the flip side of the same coin?

A Not always.

ARBITRATION - VOLUME III

Q In most cases, yes?

A In this case, yes.

Q Thank you.

Am I correct that the actuarial profession has set forth standards of practice on the issue of selecting investment return assumptions and discount rates, correct?

A Yes.

Q And in preparing your Actuarial Valuation Reports and developing an investment return assumption and discount rate, you applied those standards of actuarial practice, correct?

A Yes.

Q Can you turn your attention to Exhibit 10, please. Again in the white binder.

And are you familiar with this document, Ms. Egan?

A Yes.

Q And is this the ASOP, Actuarial Standard of Practice?

Is this the ASOP that guided your

ARBITRATION - VOLUME III

actuarial assumptions when you developed the Fund's investment return assumption and discount rate?

A Yes. For that valuation that we were looking at.

Q For the 2011?

A For the 2011 valuation, yes.

Q And is this the ASOP that guided your actuarial assumptions when you calculated The Times' withdrawal liability in 2013?

A Yes.

Q Can you turn your attention to Section 3.6, please, which is entitled Selecting an Investment Return Assumption and Discount Rate.

And can you please review the first three paragraphs under that heading.

A Okay.

Q Do you agree with the actuarial principles that are set forth in those two, three paragraphs under the heading Selecting an Investment Return Assumption and Discount Rate?

ARBITRATION - VOLUME III
A In most cases, yes.
Q What would be the instances in which you would not apply the principles that are set forth in those paragraphs?
A Which specific principle are you talking about?
Q Fair question. Let's turn to the first big paragraph, the one that reads, "The discount rate is used to determine the present value of expected future plan payments. Generally, the appropriate discount rate is the same as the investment return assumption."
Let me stop there and ask you.
Do you agree with that actuarial principle?
A Yes.
Q And the next sentence goes on to say, "But for some purposes such as SFAS Number 87 or unfunded plan valuations, the discount rate would be selected independently of the plan's investment return assumption, if any."
So do you understand that sentence

ARBITRATION - VOLUME III
to provide exceptions to the general principle?
A Yes.
Q Do you believe that the exceptions that are articulated in that sentence apply in the case of calculating withdrawal liability in connection with a pension plan that has a pool of invested assets?
A Repeat the question.
(Requested portion of record read:
"Q. Do you believe that the exceptions that are articulated in that sentence apply in the case of calculating withdrawal liability in connection with a pension plan that has a pool of invested assets?")
(End of read-back.)
MR. RICHMAN: I'm going to object.
What exceptions are we talking about because I'm not sure we're talking about the same thing.
MR. MILLER: Well, let me ask the witness.

ARBITRATION - VOLUME III
BY MR. MILLER:
Q Let's focus on the sentence that says, "For some purposes such as SFAS Number 87 or unfunded plan valuations, the discount rate may be selected independently the plan's investment return assumption."
So let me ask you: In your judgment, does this sentence articulate any exceptions to the general principle that you use the investment return assumption as the discount rate, this sentence here?
A That sentence gives examples of exceptions.
Q Okay. And what are those examples?
A If you are doing FAS 87 --
Q And let me stop right there.
In other words, if the financial accounting standards would mandate a different discount rate, then this sentence authorizes the actuary to use the FAS-mandated discount rate; is that fair?
A The sentence before it authorizes that generally the appropriate discount rate is the same as investment return. That

ARBITRATION - VOLUME III
tells me that there are exceptions.
Q And one of them is in connection with FAS requirements, correct?
A One of them, based on this, yes.
Q And the other based on this sentence is in connection with unfunded plan valuations, correct?
A Right. That looks like the two examples, yes.
Q Right. And my question was: Do either of those exceptions have any application in calculating withdrawal liability for a pension plan that has invested and thus funded assets?
A I'm not sure what one has to do with the other.
Q In other words, they have no application to the calculation of withdrawal liability, these two exceptions.
Strike that. Let me articulate better.
Am I correct that these two exceptions have no application to the calculation of withdrawal liability?

ARBITRATION - VOLUME III

A Those particular exceptions.
Q Do not apply -- have any application to the calculation of withdrawal liability, correct?
A Correct.
Q I take it you you've heard of the term "Segal blend."
What is your understanding of the concept Segal blend?
A Segal blend is -- I use as my best estimate to calculate the unfunded vested benefits for withdrawal liability purposes.
The way it works?
Q Yes. Why don't you go ahead and explain how the Segal blend method works to derive a withdrawal liability amount.
A A withdrawing employer, in my view, is looked upon as at a point where he's settling his pension obligation. And there are a couple ways you can settle your pension obligation, one being paying lump sums to the participants or purchasing annuities for them.
And if you were to go out and

ARBITRATION - VOLUME III

purchase annuities, you would pay a certain interest rate for them. And we use the Pension Benefit Guaranty Corporation publishers' rates that we use that are in line with use information for insurance companies for purchasing annuities.
So we calculate the liability based on these rates.
As far as the funding rate, we don't use the funding rate to come up with the liability. It's my view that the funding rate is a long-term rate. It reflects that the assets are in riskier -- you may be expecting to get higher interest rates because a long-term rate, your assets are held in investments that could be riskier.
And, therefore, there's a risk taken by the ongoing employers. The withdrawing employer is not taking that risk, so they shouldn't benefit from -- they shouldn't benefit from a risk that they didn't take, that they are not taking.
So we don't use the funding

ARBITRATION - VOLUME III

assumption. We use the PBGC rates, but we don't solely just use the PBGC rates because withdrawal liability is not typically paid in a lump sum. It's paid over a period of time.
So what we do is we do a blend. We do a blend of using the more current rate which is by proxy the PBGC, the more current rate for the liabilities up to the market value of assets because in essence the thought is that with the assets, you go out and you purchase annuities.
For the liability above that, we say -- the thought is that a more long-term expectation of what the annuity rates would be, we use a proxy of the funding assumption for that.
So we do a blend of the two to come up with the liabilities.
On the asset side, we use the market value of assets because, again, it's on more of a termination basis. It's the employer settling their obligation.
So that's how we come up with the

ARBITRATION - VOLUME III

liability pieces and asset pieces to come up with the unfunded vested benefits for withdrawal liability purposes.
Q Let me see if I can unpack that a little bit.
So am I correct that the Segal blend is a method in which the plan's liabilities are valued using different discount rates, correct?
A Yes.
Q And a portion of the plan's liabilities are valued using PBGC rates, correct?
A Uh-huh.
Q And another, the remaining portion of the plan's liabilities are valued using the plan's investment return assumption, correct?
A Well, that's used as a proxy, the investment return assumption, a more long-term assumption.
Q In making the calculation, you are in fact using in part the plan's investment return assumption, in this case 7.5 percent,

Page 582

ARBITRATION - VOLUME III

correct?
A Yes.
Q And more particularly, you use the PBGC rates to value the liabilities up to the market value of assets. And in connection with the liabilities in excess of the market value of assets, for those liabilities, you switch and use the investment return assumption, correct?
A The more long-term assumption, yes.
Q Which is the investment return assumption, correct?
A Yes.
Q And in the case of The New York Times' assessment, you use 7.5 percent, correct?
A Yes.
Q And did I hear you correctly that in your judgment, these PBGC rates are designed to approximate the rate for purchase of annuities to settle pension obligations, correct?
A Yes. They're used as a proxy for that, yes.

Page 583

ARBITRATION - VOLUME III

Q So they are in a sense a proxy for commercial insurance annuity rates, correct?
A Yes.
Q And your view is that the investment return assumption is a proxy for the long-term expected annuity rates?
A Yes.
Q In the 1980s, were PBGC rates higher or lower than the discount rates that multiemployer plans were using at the time to value liabilities for funding purposes?
A In the '80s? I think it was more typically higher in most cases. I can't say for every situation.
Q And so for a pension fund at that time in which the investment return assumption and discount rate for funding purposes was lower than the PBGC rate, use of the Segal blend at that time would have resulted in a higher effective investment return assumption and discount rate for withdrawal liability calculation purposes, right?
A Typically.

Page 584

ARBITRATION - VOLUME III

Q And in using a higher effective discount rate, it would have resulted in a lower present value of liabilities, correct?
A In most cases, yes.
Q And thus a lower withdrawal liability, correct?
A In most cases, yes.
Q So if the Segal blend was used in the 1980s when PBGC rates were high, in most cases, it indeed would have resulted in lower withdrawal liability calculations than if the investment return assumption had been used to value liabilities?
A In most cases, yes. Generally.
Q By contrast today in the current interest rate environment, PBGC rates are customarily higher or lower than the rates that pension plans use to value liabilities for funding purposes?
A I'm sorry. Say that again. I was a little distracted.
Q In the current interest rate environment, are PBGC rates typically higher or lower than the rates that pension plans

Page 585

ARBITRATION - VOLUME III

use to value liabilities for funding purposes?
A Typically lower.
Q So then using the Segal blend in today's interest rate environment will result in a lower discount rate and, therefore, higher liabilities, right?
A Yes.
Q You used the Segal blend to calculate withdrawal liability for all of the multiemployer funds for which you serve as an enrolled actuary, correct?
A Yes. As my best estimate.
Q And the particular asset mix that the Fund to which you serve as enrolled actuary has does not matter to you, correct?
A With respect to?
Q Use of the Segal blend.
You can answer.
A I guess not, no.
Q So to put it another way, in connection with the funds to which you served as an enrolled actuary, you used the Segal blend assumptions for calculating

ARBITRATION - VOLUME III

withdrawal liability regardless of the particular pension plan's actual portfolio of assets, correct?

A Yes.

Q For funding purposes, not withdrawal liability purposes, if there are obligations over the next 20 years of that fund, do you use PBGC rates as the discount rate for funding purposes?

A Repeat the question again.

Q Sure.

For funding purposes, if a pension plan has obligations over the next 20 years, do you use the PBGC rates as the discount rate for funding purposes?

A For any client, you are saying?

Q For any of the funds to which you serve as the enrolled actuary.

A Not currently that I'm aware of.

Q Now, I think you mentioned a moment ago that one of the rationales for your decision to use the Segal blend is that you view the withdrawing employer as settling its pension obligations.

ARBITRATION - VOLUME III

Do you remember that testimony?

A Yes.

Q In the event of a single-employer plan, not a multi, but a single-employer plan, a standard termination, in that instance the pension plan in fact goes out and buys annuities to fund its benefit obligations, correct?

A I'm not -- I haven't done a single-employer termination, so I don't know exact details of the calculation.

Q Do you have any reason to believe that in a standard single-employer termination, the plan sponsor does not go out and buy commercial annuities?

A There might be details -- I don't know if they have enough money --

Q In a standard termination.

A Oh, a standard. I don't -- I'm not familiar with the exact details of the calculations.

Q You just don't know one way or the other --

A Right.

ARBITRATION - VOLUME III

Q -- in a standard termination what --

A What the process is?

Q -- what a sponsor does in settling an obligation.

MR. RICHMAN: You guys have to go one at a time.

MR. MILLER: You need to let me finish.

MR. RICHMAN: You need to let her finish her answer, too.

ARBITRATOR IRVINGS: So I'm clear, "standard termination," you are talking about termination of a plan with funds.

MR. MILLER: Correct.

ARBITRATOR IRVINGS: As opposed to an --

MR. MILLER: Underfunded plan. That's right.

Do you need me to lay that foundation in the record?

ARBITRATOR IRVINGS: No, thank you.

ARBITRATION - VOLUME III

MR. RICHMAN: It's in the law books.

BY MR. MILLER:

Q Let's turn to a multiemployer plan.

In your experience and in connection with the funds to which you served as enrolled actuary, does a multiemployer plan typically go out and buy annuities when an employer withdraws?

A No.

Q Are you aware whether the Pension Fund here in connection with the assessment against The New York Times has gone out and purchased annuities with The New York Times' withdrawal liability payments?

A I'm not aware of that.

Q Are you familiar with the concept of a plan partition?

A Yes.

Q What is a plan partition?

A Basically, the plan is segregated -- is split -- or a piece -- I don't want to use the same word "partition" -- split where a portion of it

ARBITRATION - VOLUME III

moves out of the plan and either goes into another fund, another -- stands alone or is picked up by the PBGC and the pieces are separated.

Q Okay.

In your experience as an enrolled actuary, did any of the funds to which you served as actuary partition a withdrawing employer's liabilities following a withdrawal and the assets allocated to them and had the withdrawal liability payments made into the partitioned plan?

MR. RICHMAN: Objection as to relevance. Where are we going?

ARBITRATOR IRVINGS: We need some sense.

MR. MILLER: Right. Partitioning a plan is also a potential way of settling liabilities.

And so what I'm getting at here is that when an employer withdraws from an ongoing plan, the typical means of settling obligations are not in fact

ARBITRATION - VOLUME III

undertaken. Thus, the analogy that is at the center of the Segal blend is not reasonable.

ARBITRATOR IRVINGS: Go ahead.

MR. MILLER: Please repeat the question.

(Requested portion of record read:

"Q. Okay.

In your experience as an enrolled actuary, did any of the funds to which you served as actuary partition a withdrawing employer's liabilities following a withdrawal and the assets allocated to them and had the withdrawal liability payments made into the partitioned plan?")

(End of read-back.)

A I don't have any plans that did that.

Q And I take it you're not aware of whether the Pension Fund here has partitioned The New York Times' liabilities and had its withdrawal liability payments made into a partitioned plan?

ARBITRATION - VOLUME III

A I'm not aware.

Q Generally speaking, withdrawal liability payments to a fund are pooled with all other contributions and assets in that fund and invested in the same manner, correct?

A I would assume so.

Q Do you have any reason to believe that it would not be?

A I'm not the investment manager, but I don't have any reason to believe.

Q In your experience, has it ever been the case -- strike that.

In your experience, isn't it true that in all cases withdrawal liability payments to the multiemployer fund are pooled with all other contributions and assets and invested in the same manner?

A Can you repeat the beginning?

(Requested portion of record read:

"Q. In your experience, isn't it true that in all cases withdrawal liability payments to the multiemployer fund are pooled with all other

ARBITRATION - VOLUME III

contributions and assets and invested in the same manner?")

(End of read-back.)

A I don't know if it's all cases, but typically they're together.

Q They're pooled and invested together?

A Typically. I don't know if it's in all cases.

Q Are you aware of any case in which that was not done?

A Off the top of my head, I can't think of one.

Q And am I correct that the withdrawal liability payments, once pooled with all of the other assets, are invested for the long term?

A If that's their investment policy.

Q Are you aware of any multiemployer funds to which you are the actuary that does not invest for the long term?

A Those that expect to be there for the long term. Unless someone is going insolvent, they may have a different

Page 594

ARBITRATION - VOLUME III

investment strategy.
Q So in the absence of an expected insolvency, multiemployer plans invest for the long term, correct?
A Typically.
Q Based on the rationale that you gave for the Segal blend, do you believe that the Segal blend is justified on the ground that if the plan's investments turn out to generate returns below the best estimate investment return assumption, the withdrawing employer cannot be assessed any additional liability?
A Say that again.
(Requested portion of record read:
"Q. Based on the rationale that you gave for the Segal blend, do you believe that the Segal blend is justified on the ground that if the plan's investments turn out to generate returns below the best estimate investment return assumption, the withdrawing employer cannot be assessed any additional liability?")

Page 595

ARBITRATION - VOLUME III

(End of read-back.)
A Yes.
Q So by charging the withdrawing employer more in liability than would be charged if the investment return assumption best estimate were used, the Segal blend effectively provides a cushion in the event that the pension fund falls short of its best estimate investment return assumption, correct?
A That doesn't always happen. Sometimes it's the reverse. So it's not necessarily ...
Q In the current interest rate environment, however, by charging the withdrawing employer more in liability than would be charged if the best estimate investment return assumption is used, the Segal blend provides a cushion in the event the plan falls short of its best estimate investment return assumption, correct?
A Can you repeat it again.
(Requested portion of record read:
"Q. In the current interest rate

Page 596

ARBITRATION - VOLUME III

environment, however, by charging the withdrawing employer more in liability than would be charged if the best estimate investment return assumption is used, the Segal blend provides a cushion in the event the plan falls short of its best estimate investment return assumption, correct?")
(End of read-back.)
A The intention is not to provide a cushion. It's to not have the employer share in the risk that's being taken by the ongoing employers.
Q But I didn't ask you what the intent of the Segal blend is. I asked you a question about the consequence of the Segal blend.
And isn't it the case that in the current interest rate environment by charging withdrawing employers more in withdrawal liability than would be charged if the best estimate investment return assumption is used, the Segal blend provides a cushion in the event the plan falls short

Page 597

ARBITRATION - VOLUME III

of its best estimate?
A Because the way the mechanics work and there is a higher number, there is more being charged.
Q Let me ask you this question: Isn't it true that the fund's -- a fund's assets could turn out to generate higher returns than the plan's best estimate funding investment return assumption?
A The experience -- repeat the question.
Q Isn't it true that the fund's assets and actual experience could result in returns that are higher than the plan's current best estimate funding investment return assumption?
A Yes. It could be higher, it could be lower.
Q Exactly.
And in the event that the returns are higher than the best estimate investment return assumption, an employer who has been assessed with withdrawal liability will not receive a refund of its earlier assessed

Page 598

ARBITRATION - VOLUME III

liability payments, correct?

A Right.

Q When you certify that your best estimate investment return assumption is 7.5 percent, that means the returns might be higher or might be lower but on average over the long term are expected to return 7.5 percent annually; isn't that correct?

A Yes.

Q Let's turn back to Exhibit 1 which is the actual withdrawal liability calculation in this case.

And why don't you draw your attention to FUND-000730.

Are you there?

A Yes.

Q So you indeed in this case utilized the Segal blend in calculating The Times' partial withdrawal liability, correct?

A Yes.

Q And this page, 0000730, sets forth the particular interest rates that you in fact blended in applying the Segal blend, correct?

Page 599

ARBITRATION - VOLUME III

A Yes.

Q And can you briefly summarize what those interest rates were that you blended together?

A For the valuation as of May 31, 2009 of the unfunded vested benefits, we used for the PBGC rates 5.5 percent for the first 20 years and 5.02 percent thereafter.

And for the long-term rate, we used 7 and a half percent.

Q And by "long-term rate," you mean for the portion -- for the long-term rate, you mean the portion for the vested benefits that were not matched by the market value of plan assets using the PBGC rates, correct?

A Yes.

Q And for those you used the investment return assumption of 7.5 percent, correct?

A Yes.

Q And the result of using those blending rates was an effective investment return assumption that was less than 7.5 percent, correct?

Page 600

ARBITRATION - VOLUME III

A Yes.

Q And that effective investment return assumption was below your best estimate of the future returns that the NMDU Fund's assets are expected to generate over the long term, correct?

A Yes.

Q And that effective investment return assumption was also below your best estimate of the future anticipated experience of this Pension Fund, correct?

A Expected for the long term?

Q Yes.

A Yes.

Q Yes.

So just to confirm: The resulting effective investment return assumption by applying the Segal blend was lower than your best estimate of the future anticipated experience of this plan over the long term?

A Yes.

Q Now, you previously testified that the PBGC rates are, in effect, a proxy for commercial insurance annuity rates, right?

Page 601

ARBITRATION - VOLUME III

A Yes.

Q And is it fair to say that commercial insurance companies when they issue annuities, they tend to support those annuities largely or principally through ownership of high grade corporate bonds, correct?

A I'm not sure of the details.

Q Let me ask you this question: Do you have any reason to believe that the NMDU Fund here is planning to change its investment mix in the near future?

A I have no idea what they're planning to do.

Q And in connection with the withdrawal liability payments that are being made by The New York Times in connection with this assessment, they are in fact going into the same pool of assets that the other contributing employers' contributions are going into, correct?

A It's my understanding.

Q Right.

And the payments made by The Times

ARBITRATION - VOLUME III

are in fact invested like all the other assets over the long term, correct?

A I would think so.

Q And the Pension Fund is not using The Times' payments to purchase annuities, correct?

A Not that I know of. I'm not aware.

Q You've been employed at Segal since -- strike that.

Let me ask you this question: Do you believe that it is appropriate to use current market rates to value all of the liabilities of a Pension Fund in calculating withdrawal liability?

A Repeat the question again.

(Requested portion of record read:

"Q. Do you believe that it is appropriate to use current market rates to value all of the liabilities of a Pension Fund in calculating withdrawal liability?")

(End of read-back.)

MR. MILLER: Strike that. Let me rephrase the question. I think I

ARBITRATION - VOLUME III

can do so in a more articulate way.

BY MR. MILLER:

Q In your opinion, would it be appropriate for an actuary in valuing liabilities for withdrawal calculation purposes to use purely a commercial annuity rate as opposed to a blend?

MR. RICHMAN: Objection. He's asking for an opinion.

Rephrase the question and ask what she does.

He is asking for an opinion. She is not here as an expert witness.

ARBITRATOR IRVINGS: You can respond.

MR. MILLER: Yes. But I'm allowed to ask her for her justification of use of the Segal blend as compared to other approaches.

And I'd like to ask her whether she would embrace a different approach and, if she wouldn't, why not.

ARBITRATOR IRVINGS: You can

ARBITRATION - VOLUME III

have it. Go ahead.

(Requested portion of record read:

"Q. In your opinion, would it be appropriate for an actuary in valuing liabilities for withdrawal calculation purposes to use purely a commercial annuity rate as opposed to a blend?")

(End of read-back.)

A I would not use a pure annuity rate for the reasons I explained about the Segal blend.

Whether another actuary believes that that is their best estimate, that's their belief.

Q And in connection with the Pension Fund here and the calculation of The New York Times' partial withdrawal liability, in your judgment, it would not be appropriate to use exclusively or purely a commercial annuity rate, correct?

A I would not use it.

Whether someone else would find it appropriate, that's for them to say.

Q But you, personally, do not find it

ARBITRATION - VOLUME III

appropriate?

A I would use the Segal blend and that's my best estimate.

Q That's not the question I asked.

The question I asked is: You, personally, as the actuary for this Fund do not think it is appropriate to use purely a commercial market annuity rate to calculate withdrawal liability?

A I, personally, would not use it.

Q And in your judgment it's not appropriate, correct? Yes or no?

A Whether another actuary finds it reasonable ...

ARBITRATOR IRVINGS: The question is what do you find it?

A There are many ways that it could be done. I don't think it's unreasonable to use funding. I don't think it's unreasonable to use one rate, but I wouldn't do it. I would do it the way I do it which is the Segal blend.

Q You've been at Segal since approximately 1990; is that right?

ARBITRATION - VOLUME III
A 1982.
Q Since?
A 1982.
Q And in your role as enrolled actuary for multiemployer plans, you've always used the Segal blend method, correct?
A Yes.
Q And I think as we discussed earlier, I think your testimony was that there was a period of time in the 1980s in which the Segal blend would cause withdrawal liability to be lower than it would be had plan investment return assumptions be used.
Do you remember that testimony?
A Yes.
Q And but I take it there came a time when interest rates associated with commercial annuities fell below investment return assumptions such that, as is currently the case, use of the Segal blend began to cause increases in withdrawal liability relative to application of investment return assumptions, correct?
A Yes.

ARBITRATION - VOLUME III
Q Do you know who Thomas Levy is?
A He is the chief actuary for the Segal blend.
Q Do you know who Judith Mazo is?
A She was a legal counsel for the Segal Company.
Q She's retired now, right?
A Yes.
Q She was long-time legal counsel to the Segal Company?
A Yes. I don't know how long. "Long time," I don't know what that means.
Q Do you know if they ever provided any guidance about the use of the Segal blend to the consulting actuary staff?
A I'm sure they would send out any -- I'm sure they sent out guidance throughout the years.
Q Have you ever heard of a Supreme Court case called Concrete Pipe?
A Yes.
Q Ms. Egan, I would like to draw your attention to the green binder, which is the Objected Exhibits binder.

ARBITRATION - VOLUME III
And to Objected Exhibit 5.
A Which one?
Q Five.
MR. RICHMAN: Let's have the Objected Exhibit 5 objected to.
We object to this with respect to relevance.
This memo does not have any relevance to how the Segal blend was used in this case. It doesn't have any relevance to actuarial principles that Ms. Egan used to develop The Times' calculation, and we are going to go off on a witch hunt here.
MR. MILLER: Can I lay a brief foundation and then respond, Mr. Arbitrator?
ARBITRATOR IRVINGS: Go ahead.
BY MR. MILLER:
Q Ms. Egan, do you recognize this document?
A It looks familiar.
Q Do you recall seeing this document during the course of your actuarial

ARBITRATION - VOLUME III
practice?
A Yes.
Q And this document appears to be a memo from Mr. Levy and Ms. Mazo dated March 29, 1994 relating to use of the Segal blend following the Supreme Court's decision in Concrete Pipe; is that correct?
A Yes.
Q And could you take a moment and review carefully the first paragraph.
MR. MILLER: And, Mr. Arbitrator, I would ask you to review it as well in connection with laying the foundation for its relevance.
May I respond?
ARBITRATOR IRVINGS: Go ahead. If you are done laying a foundation, go ahead.
MR. MILLER: Yes.
As you know from our opening brief, Mr. Arbitrator, we take the position that indeed under the Supreme Court's decision in Concrete Pipe, the statutory

ARBITRATION - VOLUME III

requirements on actuaries in calculating withdrawal liability, which statutory requirements says that the actuary has to use assumptions that in the aggregate are reasonable and the best estimate of anticipated experience requires that the investment return assumption for funding purposes be used in calculating liabilities for withdrawal liability purposes.

This memo is a memo from senior people at the Segal Company in which the Segal Company recognizes, having developed the so-called Segal blend, that the Supreme Court decision in Concrete Pipe, as they concede, raises a serious question whether continued use of the Segal blend is permissible.

That's what they say in the very first paragraph.

In the second paragraph and throughout the remainder of the memo, they state these issues about continued use of the Segal blend must be brought to

ARBITRATION - VOLUME III

the attention of clients who might be affected.

And the clear implication of the memo and its attachments is that the very actuarial consulting firm that developed this approach recognized that the Supreme Court decision could -- and we submit does -- render that approach illegal. And they wanted to take steps, as set forth in the memo when you read it in its entirety, to protect themselves from potential professional liability in the event it continued to be used and was eventually found to be illegal.

So the fact that the very consulting firm that developed this approach found the Supreme Court decision, which we're relying upon, as raising a serious issue of the continued legal permissibility is, I would submit, not merely relevant but highly relevant and should be given appropriate weight by you in your decision here.

MR. RICHMAN: Okay. Whether

ARBITRATION - VOLUME III

the Segal method is illegal under Concrete Pipe is a legal question.

The fact that the Segal Company issued a memo saying it raised -- and it actually says, "The US Supreme Court decision raises the question whether that is permissible" -- is -- has no weight whatsoever in anyone, whether it's yourself or a court, deciding whether Concrete Pipe determined that the Segal blend is impermissible."

This is a legal question.

ARBITRATOR IRVINGS: I'll get to you, too. Don't worry.

(Laughter.)

MR. RICHMAN: I could see him out of my left eye. I didn't know if he was going to jump on the table.

And are we seriously going forward with the argument here that because the Segal Company raised the issue and asked its actuaries to do certain things with respect to their clients, that somehow that lends a support for a legal

ARBITRATION - VOLUME III

determination as to whether what Concrete Pipe decided?

The fact of the matter is, as we know, Courts subsequent to Concrete Pipe don't interpret Concrete Pipe the way that The Times interprets it. In fact, the Seventh Circuit, Judge Posner, specifically endorses the use of the Segal method.

The other thing is that we're now going to go down the road and the reality is the Segal method (sic.) hasn't retreated from the use of the Segal method.

And we already had testimony from this witness about how she uses it for all of her plans from beginning to end.

And so I really don't understand why we're going to go on this detour. It has no relevance.

MR. MILLER: Mr. Richman suggested that there was no link between this memo and the factual record.

ARBITRATION - VOLUME III

And, indeed, what I would like to know by further questioning of Ms. Egan is did she indeed discuss this memo with her clients? Did she discuss it with the NMDU Fund per the memo's guidance? And to the extent she did not, why not? And what her judgment was, her factual judgment was in connection with understanding and applying the guidance provided by this memo.

Those are factual links and credits (phonetic).

ARBITRATOR IRVINGS: I think that on the issue of binding legal determination, I think you're correct. As the basis for factual inquiry, it's a relevant document.

So you can have the document.

We'll mark it as 118.

(Arbitration Exhibit 118, Memorandum dated March 29, 1994, was marked in Evidence.)

ARBITRATOR IRVINGS: 118 is a memo dated March 29, 1994 from Thomas

ARBITRATION - VOLUME III

Levy and Judith Mazo, M-A-Z-O, to consulting staff and others.

BY MR. MILLER:

Q So, Ms. Egan, I think you testified that you had seen this document before.

Did you ever discuss the issue of whether the Concrete Pipe decision foreclosed application for the Segal blend with the NMDU Fund?

A This is 20 years ago. I don't recall the details.

Q Do you not recall the details of the memo, or do you not recall the details of raising the issue of the implications of the Concrete Pipe decision with your client NMDU Fund?

A I don't recall whether it was raised or not. It was 20 years ago. I have numerous clients --

MR. RICHMAN: Just answer the question.

A Okay. I don't recall.

Q Do you recall discussing the guidance in this memo with any of the

ARBITRATION - VOLUME III

multiemployer plans to which you served as enrolled actuary?

A I don't recall specifically a client.

Q After receiving and reviewing this memo, did you have any conversations with any of your fellow actuaries at the Segal Company about the memo and its implications to continued use of the Segal blend?

A I'm sure there was discussion, but I don't remember specifics.

Q But you do remember discussing this with your fellow actuaries at Segal?

A At some point, there would have been a discussion at some point. I don't remember details at all.

Q I think you previously testified that your best estimate of how the assets in the NMDU Fund are going to perform over the long term is 7.5 percent, correct?

A For the long term, yes, for valuations purposes.

Q And 7.5 percent is indeed your best estimate of long-term performance for this

ARBITRATION - VOLUME III

Fund, correct?

A Yes.

Q But for withdrawal liability purposes, you apply a different best estimate of liabilities, correct?

A Yes.

Q Is that withdrawal liability best estimate based on your assessment of the future performance of the same pool of assets that are currently in this Fund's portfolio?

A Repeat the question.

(Requested portion of record read:

"Q. Is that withdrawal liability best estimate based on your assessment of the future performance of the same pool of assets that are currently in this Fund's portfolio?")

(End of read-back.)

A The best estimate is based on, as I described before, of the Segal blend is a blend of the two because of the way we view an employer.

I'm confused.

ARBITRATION - VOLUME III

Q Let me see if I can ask the question a little differently for you.
A I'm not sure where you are going.
Q Is your withdrawal liability best estimate based on an assessment or an assumption respecting a hypothetical pool of assets that are not currently in this Pension Fund?
A I'm not sure how to answer that question.
We use the market value of assets, the current value of assets, and we discount the liabilities using the blend to come up with their unfunded vested benefits.
Q And am I correct that the rate for the current value of assets is a rate that is tied to investment -- strike that -- is tied to interest rates on high quality corporate bonds?
A It's a snapshot of the value of the assets at that point in time. The assets are a snapshot at that point in time.
MR. MILLER: Strike that. Let me start again.

ARBITRATION - VOLUME III

BY MR. MILLER:
Q In determining the withdrawal liability best estimate, you said that you do so based on current market rates, correct?
A Yes. To discount the liabilities.
Q To discount the liabilities, exactly.
So the discount rate that you use in your withdrawal liability best estimate is a discount rate that is tied to current market rates, correct?
A Yes. It's actually the blend, the blend of the two.
Q The blend of the two.
A Right.
Q And one part of the blend is current market rates, correct?
A Yes.
Q And by "current market rates," you mean rates on commercial annuity products or a proxy thereof like the PBGC rates?
A Yes.
Q And commercial annuity rates are

ARBITRATION - VOLUME III

typically derived from rates on investment grade bonds, correct?
A I'm not sure how the annuity rates are derived, but ...
Q Okay. So in using your -- strike that.
In developing your withdrawal liability best estimate, you do so at least in part based on current market rates, and you don't know what the underlying basis is for those current market rates, correct?
A We use the PBGC rates which are a proxy of annuity purchase rates.
Q And you don't know what the basis is to derive those annuity rates, correct?
A Yes.
Q That was a yes?
A Yes.
Q It is fair to say, however, that you use two different approaches to derive the two different best estimates in, on the one hand, determining liability for funding and, on the other hand, determining liabilities for withdrawal liability?

ARBITRATION - VOLUME III

A Yes.
Q Ms. Egan, can you summarize your understanding of the term "vested benefits."
A "Vested benefits"?
Q Yes.
A The benefits that a participant is -- have a nonforfeitable right to -- I don't want to use the word "vested" -- that they're vested in.
Q So essentially the term "vested benefits" is the pension amount that an employee has a nonforfeitable right to, correct?
A Yes, essentially.
Q And those vested benefits are necessarily and exclusively the pension liability amount, correct?
A That they are or they aren't?
Q They are.
So those pension benefits are --
MR. MILLER: Strike that. Let me start again.
Q Vested benefits are pension liabilities, correct?

ARBITRATION - VOLUME III

A The vested monthly benefit is the amount of money that the participant will receive.

Q In a pension, correct? As opposed to an expense of the plan.

A Oh, oh, okay.

Q Here's where I'm getting, the term "vested benefits" does not include pension plan expenses, correct?

A Correct.

Q So in connection with the NMDU Fund, for funding purposes, you do not include administrative expenses in valuing the Pension Fund's pension liabilities, correct?

A We include it with the normal costs of the plan, which is a liability.

Q But you don't include it in calculating the present value of the Fund's liabilities, correct?

A Correct.

Q And why is that?

A Because it's included as a term cost with the normal cost which is a

ARBITRATION - VOLUME III

liability.

And I have to take back what I said. It is part of the liabilities but not the present value of vested benefits. It's part of the normal cost liability.

Q Just to clarify the record, but not part of the present value of vested benefits, correct?

A Calculation, yes. Present value of vested benefits calculation.

Q Correct?

A Yes.

MR. MILLER: Mr. Arbitrator, at this point, I am done.

Let me ask you this: In connection with the third issue in this arbitration, the so-called ordering of the calculation of the revised assessment, it's The New York Times' view that the documents make clear that the ordering of that calculation was changed.

Because of that, unless, Mr. Arbitrator, you would like me to ask some questions to confirm for the factual

ARBITRATION - VOLUME III

record that when Ms. Egan calculated the revised assessment, she changed the order of calculations. In the absence of your thinking that's necessary, at this juncture, we have no further questions.

MR. RICHMAN: We had an agreement.

MR. MILLER: And that's why I'm raising it and that's why I'm not asking the question yet.

ARBITRATOR IRVINGS: It's a legal issue.

MR. MILLER: That's fine. That's why I raised it, just to confirm without asking any questions.

MR. RICHMAN: Take a little break and we'll come back, and I would like to start going because we have Mr. Kra.

ARBITRATOR IRVINGS: We are going to take a meal break at some point?

MR. RICHMAN: Yeah, I never want to forgo lunch.

ARBITRATION - VOLUME III

ARBITRATOR IRVINGS: Off the record.

(A brief recess was taken.)

CROSS EXAMINATION BY MR. RICHMAN:

Q Do you communicate with the Pension Fund office?

A With the Pension Office?

Q With the Pension Fund office?

A Sometimes.

Q Who have you communicated with at the Pension Fund office during the time you've been the enrolled actuary for the Pension Fund?

A Mostly with Murray Schwartz.

Q And Mr. Schwartz, he's the director?

A Was the director.

Q That's right. All right.

And how frequently did you communicate with the Pension Fund office during the time you were the enrolled actuary for the Fund?

A Not that often, depending on what it is we're working on. It would be in

ARBITRATION - VOLUME III

spurts, so depending on what we were working on. Sometimes he called me, I didn't call him.

Q When he would call you, what would he call you about?

A Maybe he didn't understand a number in a report or ...

Q Would he call you to ask you to do things?

A Typically, it would be through John, typically, if he asked.

Q And let's just for the record -- so the record is clear, "John" is John Urbank?

A John Urbank.

Q Who is one of your colleagues at Segal?

A One of my colleagues at Segal.

Q Do you communicate directly with the trustees of the Pension Fund?

A No. Other than at meetings, a trustee meeting, no, no.

Q But you do communicate with him at trustee meetings?

A Yes.

ARBITRATION - VOLUME III

Q And so you attend trustee meetings?

A Yes.

Q And do you attend all the trustee meetings?

A No, not all of them.

Q And how often do you attend trustee meetings?

A Approximately once a year, twice a year. Depends on how often they are in a given year because they are not -- it's not -- what's the word I want? -- it varies by year.

Q Does Segal have a point person who is charged with communicating with the Pension Fund?

A Yes.

Q And who is that?

A That's John Urbank.

Q During the -- withdraw that.

When you became an enrolled actuary at Segal and were providing -- and serving as an enrolled actuary for clients, did you initially use the Segal method for calculating withdrawal liability?

ARBITRATION - VOLUME III

A I always used the Segal method.

Q Always?

A Yes.

Q So there's not a single instance in which you haven't used the Segal method?

A Not as my best estimate, correct.

Q When you became the enrolled actuary at the Pension Fund, what was the withdrawal liability method that the Pension Fund was using?

A The method was the presumptive method.

Q And what was the method used to calculate the interest assumption for determining withdrawal liability?

A The Segal blend.

Q Okay. And so that was in place when you became the actuary?

A Yes.

Q Do you know how long it was in place before you became the actuary?

A No, I don't know.

Q Now, you testified previously in response to Mr. Miller's questions that the

ARBITRATION - VOLUME III

contribution base units for the pension funds was shifts.

A Yes.

Q How did you know that?

A Any correspondence that I had as I took over the case, any correspondence I saw referred to shifts. Any conversation at any meeting, people talked about shifts. There was no reason to believe it wasn't shifts.

Q When you talk about any discussion at any meeting, you are talking about meeting of whom?

A A trustees meeting.

Q Okay.

Did this Pension Fund ever use a contribution base unit other than a shift?

A Not that I am aware of.

Q So did you ever use a contribution base unit other than a shift?

A In doing --

Q I'm sorry, for this Fund.

A For this Fund in doing an actual calculation?

Q Yes.

ARBITRATION - VOLUME III
A No.
Q Did you ever review The New York Times Collective Bargaining Agreement with the Union?
A No.
Q Why not?
A There was no need to for my purposes.
Q And why was there no need to do so?
A Because I didn't need it in any of the calculations. I didn't need to look at the Collective Bargaining Agreement for any reason.
Q Did you ever review the C & S Collective Bargaining Agreement with the Union?
A C & S?
Q C & S.
A No.
Q Okay.
Did you ever review The Times' remittance reports to the Pension Fund?
A Remittance reports, no.
Q Why not?

ARBITRATION - VOLUME III
A There was no need for me to see the remittance reports.
Q Now, we discussed in response to Mr. Miller's questions CBUs or contribution base units.
Can you tell us what a contribution base unit is and what your understanding is?
A My understanding of contribution base unit is the basis for how you make contributions, whether it be -- you provide a dollar amount per an hour, a day, a specified unit of measurement for how to -- for how much contributions are put into the fund.
Q Okay. And what is a contribution rate?
A It's the amount of the -- the dollar amount that is being put into the fund by this unit.
Q Okay. So is the contribution rate the same as the contribution base unit?
A No.
Q If you would turn to Exhibit 42.
A What color?

ARBITRATION - VOLUME III
Q White.
Okay. You previously testified about this.
Let's look at 3-31-2013. Do you see on the left side it says "effective 3-31-2013." It's on Page FUND-2371.
You there?
A Yes.
Q And if you look under Pension Fund High Rate.
A Yes.
Q And it says "$300.18 times 8 percent."
A Yes.
Q What is that?
A 3.18 times 8 percent, what is that?
My understanding is one is the wage rate and the other is the allocation of the wage rate to total the contribution rate.
Q What would be the contribution rate there?
A $24.01.
Q And look over in the left-hand side of that same group of calculations. And see

ARBITRATION - VOLUME III
it says "day rate, short night, long night, SAT night."
What are those?
A The different types of shifts that those contribution rates correspond to.
Q Okay.
Now, you testified previously that you did some withdrawal liability estimates for the Fund, correct?
A Uh-huh.
Q And you also did some withdrawal liability assessments, correct?
A Uh-huh.
Q What I want to do is take you through a few of those.
Let's take a look at Exhibit 107.
Have you seen this document before?
A Yes.
Q What is it?
A It's a withdrawal liability estimate for El Diario.
Q Who or what was El Diario?
A One of the employers to the Pension Fund, NMDU Pension Fund.

Q Contributing employer?
A A contributing employer, yes.
Q You see it says in the "from" line, it has your name and Mr. Urbank's name.
Do you see that?
A Yes.
Q Did you prepare this with Mr. Urbank?
A Yes.
Q And the first line says, "As requested, we have estimated the potential withdrawal liability for El Diario, an employer of the above fund, assuming withdrawal during the year ended May 31, 2011.
Do you know who made that request?
A Most probably Murray Schwartz.
Q And why do you answer, "Most probably Murray Schwartz"?
A Because usually he made the requests to us.
Q And when you say "to us," is it to you, to Mr. Urbank, to both of you?
A It could be any combination

thereof. Could have been to him, to me. Usually through him most requests were done.
Q Let's go to the -- well, let me ask you: In this document, is there a reference to shifts anywhere?
A No.
Q Why not?
A Because a payment schedule was not provided.
Q Okay.
A So it was not needed.
Q Okay. And there are, as I understand from your direct testimony, that there are some situations where you have provided a payment schedule for an estimate, correct?
A Yes.
Q And so how do you determine whether to provide a payment schedule for an estimate?
A We typically don't provide a payment schedule for an estimate unless we're requested to.
Q And who would request you to do

that with respect to the Pension Fund?
A That would most probably be Murray Schwartz.
Q Now, was the El Diario estimate ever discussed at a Pension Fund meeting?
A I believe this one was discussed at a Pension Fund meeting.
Q Do you know what the nature of the discussion was?
A We reported that the calculation was done.
Q Okay.
And was there any discussion at the meeting other than your report?
A My recollection is that after our report, there was further discussion of the possibility of El Diario incurring a partial withdrawal, possibility of it.
Q And what was the nature of that discussion?
A I think there was a discussion about what partials are and how partials could be and mention -- part of the discussion was that you need to track the

shifts to see if there is a 70 percent decline in the base units to see if a partial possibly occurred.
Q Were you given the assignment to track -- to determine whether partial withdrawal occurred?
A No.
Q Who was given that assignment?
A I don't know if anyone was given the assignment to determine whether it occurred. I think it was just noted that the shifts need to be kept track of to see if there is a possibility.
Q Okay. And did the Segal Company track shifts?
A No. We don't have that information.
Q And who would have that information?
A The Fund office would have that information.
Q Turn to Exhibit 99.
Do you have that?
A Yes.

Page 638

ARBITRATION - VOLUME III
Q And you see that -- well, why don't you tell us what that is.
A An estimate for withdrawal liability for Raritan Periodical Sales.
Q And did you participate in doing this estimate?
A Yes.
Q And if you see in the second paragraph, it says, "The payment schedule reflects the average annual shifts of 39,022 in the highest rate consecutive years."
Do you see that sentence?
A Yes.
Q Why did you include that sentence in the memo?
A Because a payment schedule was done, and we were just showing how it was done.
Q Okay.
Now, on the second page, do you see that it says "cc co-counsel"?
A Uh-huh.
Q Who was co-counsel at the time of this was prepared?

Page 639

ARBITRATION - VOLUME III
A This Fund has had so many changes in co-counsel over the years, I'm not even sure who co-counsel was in '96.
Q Did either of the co-counsel of the Fund raise a question to you about why you use shifts to do the schedule?
A No.
Q Did Mr. Schwartz raise a question to you as to why you use shifts to do the schedule?
A No.
Q Let's go to Exhibit 100.
And can you tell me what this is?
A A calculation for the actual withdrawal for the Daily Racing Form.
Q And who was -- or is the Daily Racing Form?
A They were a contributing employer.
Q You see in the second paragraph there is a discussion about payment schedule of average annual shifts?
A Yes.
Q Why did you do a payment schedule for this calculation?

Page 640

ARBITRATION - VOLUME III
A Because this was an actual withdrawal.
Q Okay.
And did Mr. Schwartz ask you why you used shifts to do the payment schedule?
A No.
Q And you see on the second page, there is a "cc to co-counsel."
A Yes.
Q Did either of the co-counsel ask you why you used shifts to do the calculation?
A No.
Q Let's go to Exhibit 101.
Can you tell us what this is?
A This is an actual withdrawal liability calculation for Passaic County News and that was an employer to the Fund.
Q And you see that there's a discussion, second paragraph, about a payment schedule?
A Yes.
Q And also a discussion of shifts in that second paragraph?

Page 641

ARBITRATION - VOLUME III
A Yes.
Q And why did you do a payment schedule for this calculation?
A It was an actual withdrawal.
Q Did you get any questions from Mr. Schwartz or co-counsel, who you will see on the second page are copied on this, as to why you used shifts as the contribution base unit?
A No.
Q Let's go to 102, please.
Can you tell me what this is?
A This is a report of withdrawal liability for Jalt Corporation.
Q And who is Jalt Corporation?
A That was a contributing employer.
Q Was this an estimate or an actual calculation of liability?
A I think it was an actual.
Q Did you prepare this calculation?
A Yes.
Q If you look through here, if you turn to Page 15 of the document.
A Okay.

ARBITRATION - VOLUME III

Q Which happens to be the last page.
You see it says at the top, Roman Numeral VI, Payment Schedule.
A Uh-huh.
Q And did you do that calculation?
A Yes.
Q And why did you use shifts to do that calculation?
A Because those are the base units.
Q Did anyone associated with the Pension Fund raise a question to you as to why you used shifts for contribution base units in calculating this payment schedule for Jalt?
A No.
Q Turn to 103.
If you look at 103, can you tell me what this is?
A This is a withdrawal liability report for Dow Jones.
Q And what was Dow Jones or is?
A A contributing employer of the Fund.
Q Did Doe Jones actually withdraw

ARBITRATION - VOLUME III

from the plan?
A I don't think so.
Q How do you know that?
A Because I think they're still a contributing employer, if I remember correctly.
Q Now take a look at Page 11.
And you see Roman Numeral V is the --
MR. RICHMAN: The witness can't help the Arbitrator.
ARBITRATOR IRVINGS: No, it's okay. Page 11.
MR. RICHMAN: You have more than one Page 11?
Actually, we do. That's pretty interesting. Well, what I'm focused on is 1298. FUND-1298.
So it goes 10, 11, 12, 13, 11.
Just to keep everybody on their toes.
BY MR. RICHMAN:
Q So did you calculate this payment period?
A Yes.

ARBITRATION - VOLUME III

Q And why did you use shifts to calculate the payment period?
A Why?
Q Yes.
A Because it's the base units.
ARBITRATOR IRVINGS: Can I just ask: How many of these examples, and maybe we can agree that the dialogue would be the same?
MR. RICHMAN: That's the real last one until we go into --
ARBITRATOR IRVINGS: Go ahead.
MR. RICHMAN: Just want to make sure no one misses it.
BY MR. RICHMAN:
Q So did anybody associated with the Fund, counsel or Murray Schwartz or anyone from the Fund office, any of the trustees raise a question about the calculation of Dow Jones' withdrawal liability?
A No.
Q Anybody raise a question about the calculation of the payment period?
A No.

ARBITRATION - VOLUME III

Q All right. So we are now to The New York Times estimate. Exhibit 18.
MR. RICHMAN: So we could be going for about 15 minutes or do you want to break now?
MR. MILLER: Maybe we should break now.
MR. RICHMAN: That's fine.
ARBITRATOR IRVINGS: That's fine. Could we do 45 minutes?
MR. MILLER: Yes.
MR. RICHMAN: Yes.
(A luncheon recess was taken at 12:44 p.m. through 1:36 p.m.)
A F T E R N O O N S E S S I O N
ROSANA EGAN,
resumed, having been previously duly sworn, was examined and testified further as follows:
CONTINUED CROSS EXAMINATION BY MR. RICHMAN:
MR. RICHMAN: The last document I wanted you to turn to was Exhibit 18.
We're back on the record.

BY MR. RICHMAN:
Q Ms. Egan, before we get to Exhibit 18, have you ever testified before?
A No.
Q Not in an arbitration?
A No.
Q At a court proceeding?
A No.
Q So let's look at Exhibit 18.
I think it's been well documented so far that you prepared this estimate, correct?
A Yes.
Q And did you prepare the payment schedule for the estimate?
A Originally, no.
Q Originally, no. Okay.
How did it come that you prepared the payment schedule later?
A We provided a preliminary copy and Murray Schwartz had asked us to include a payment schedule.
Q So I just want to make sure I understood your testimony. You provided a

preliminary copy to Mr. Schwartz?
A Mr. Schwartz, yes.
Q And then he asked that you provide a payment schedule?
A Yes.
Q Did you ask the Fund for information to prepare Exhibit 18?
A Yes.
Q And what did you ask for?
A We asked for everything we needed which was contribution information, shifts, base units, contribution rates. I think that was it.
Q And did you get everything you needed?
A No.
Q What did you need that you did not get?
A We didn't get the contribution rate information.
Q And why was that important for you to get?
A Because to be able to do the payment schedule, you needed contribution

rate history.
Q Okay. And, but you asked for that from the Fund?
A Yes.
Q Did anyone in the Fund tell you why they didn't give you that information?
A No. I didn't get a reason.
Q You just didn't get it?
A I just didn't get it. I'm trying to remember.
Q I'm sorry?
A I'm trying to remember, recollect the sequence of events.
Q Okay.
So let's turn to Page 16 of Exhibit 18, the last page.
And you see the note on the bottom?
A Uh-huh.
Q Did you write that?
A Yes.
Q What were you saying in the note?
A The note was attempting to say that these figures were estimated.
Q Okay.

And what did you actually do, and take it through step by step, to estimate the numbers on this page?
A We knew that the allocation of the wage rate was 6 percent, 6 and a half percent, 7 percent, and 8 percent.
So what we did was we took the contribution -- to estimate a payment, we took the contribution information and divided it by that allocation to get -- to simulate kind of a wage, and trying to piece those pieces together come up with what could be an estimate of a payment, an annual payment.
Q And what did you do to piece those pieces together?
A We multiplied the highest in one category by the highest average in the other category to get a similar number that you would get to an annual payment.
Q Okay.
Did anybody ask you a question about the note on Page 16?
A No.

Q And let's take a look Exhibit 3.
This is the second estimate that you did for The New York Times, correct?
A Yes.
Q And did you have all the information you needed in order to prepare what's been marked Exhibit 3?
A I don't think we had that there, either.
Q And let's just focus in. What is it that you didn't have?
A The actual contribution rates.
Q Okay. And you did have shift information?
A Yes.
Q And that's both for doing the calculation for Exhibit 3 and Exhibit 18?
A Yes.
Q And why was it that you couldn't do the calculation without the contribution rate information?
A The same reason for the other one is it's part of the actual calculation. So we tried to estimate it.

Q And did you estimate it in the same fashion as the other one?
A Yes.
MR. MILLER: Thank you.
MR. RICHMAN: Okay.
BY MR. RICHMAN:
Q And did you -- for Exhibit 3, did you do a payment schedule initially?
A That, I don't remember exactly. That one, I don't remember.
Q And the note on Exhibit 3 on Page 16, that is the same note from Exhibit 16?
A Basically, yes.
Q And you wrote both?
A Yes.
Q And the purpose of you writing both was the same?
A Yes.
Q Now, let's take a look at Exhibit 1.
If you take a look, there is a payment schedule in this exhibit, is there not? Apparently FUND-743, I'm told.

A Yes.
Q And did you have all the information you needed to prepare this?
A Yes.
Q Were you told by anyone at the Fund in preparing Exhibit 1 to use shifts as the contribution base units?
A No.
Q Let me show you what's been marked Exhibit 104.
Can you tell us what this is?
A This is a request for information to do a withdrawal liability calculation for Jalt Corporation.
Q And you see in the second paragraph, it says "for the withdrawing employer to determine base units"?
A Uh-huh.
Q And there is a parenthetical inside the parenthetical that says "shifts/hours."
A Uh-huh.
Q What's shifts/hours supposed to mean?
A The shifts is supposed to be the

base units.
Q Why is the word "hours" in there?
A I think it's because the shifts are a set of hours. I'm not sure exactly.
Q You see in the cc at the bottom of the letter, there are three lawyers who are cc'ed on that?
A Uh-huh.
Q And one of them is Neil Schelberg?
A Yes.
Q Did any of those lawyers ask you why you needed shifts or hours for contribution base units?
A No.
Q I just want to talk about the investment assumption that you used for the pension plan.
A Oh, okay.
Q I understand from your testimony you used 7 and a half percent and you used 7 and a half percent for the investment assumption as far back as you can remember, sitting here today?
A Yes.

ARBITRATION - VOLUME III
Q So you don't ever remember changing to 7 and a half percent for this Pension Fund?
A We could have, but I don't remember and I'd have to look it up.
Q Okay. You described briefly in response to questions from Mr. Miller how you chose 7 and a half percent.
Was the interest assumption, your best estimate, a single number?
A It's a range of numbers and you are picking a number within a range.
Q Okay. And where did 7 and a half percent fall within the range that you were picking?
A I'm not sure exactly where. Somewhere in it. I'm not sure exactly.
Q Do you know whether it was the 50th percentile?
A Could have been anywhere between the 25th and the 75th. I'm not sure exactly.
Q Why do you say the 25th and 75th percentile?

ARBITRATION - VOLUME III
A It's an educated guess here.
Q Okay.
But why did you -- you said it could have been between the 25th and the 75th percentile --
A Because I didn't think it was the top or the bottom.
Q Do you know whether 6 and a half percent would have been a reasonable investment assumption for this Fund?
A It could be, without looking at it. It could be.
Q Do you know the percentage of multiemployer pension plans that use Segal as the actuary?
A My understanding, it's approximately 30 percent in the US.
Q And is that in a certain time period?
A I think that was a survey maybe back in 2011 done.
Q And do you have an estimate as to what percentage of the actuaries at Segal used the Segal blend for withdrawal

ARBITRATION - VOLUME III
liability purposes back in 2011?
A I would say a very large percentage. Could be at least 80 percent, if not more. I'm guessing.
Q We don't want you to guess.
Now, there was a period of time the Fund was in the yellow zone, correct?
A Yes.
Q Do you know what the yellow zone is?
A Yes, I do.
Q Could you, just for the record, say what that is?
A It is one of the statuses under the Pension Protection Act that an actuary has to determine that a fund is in if it meets certain triggers.
Q And if you are in the yellow zone, what happens?
A You're what's called endangered, which says you are on the path of becoming an underfunded plan and certain -- then you have to do certain things to try to put yourself back on track.

ARBITRATION - VOLUME III
Q If you use a 6 and a half percent interest assumption, investment assumption, how would that affect a determination as opposed to 7 and a half percent as to whether this plan was in the green or the yellow zone?
A It would make them more underfunded. If you had used a lower investment return and everything else was the same, the Fund would be more underfunded and could possibly be in the yellow zone or worse.
Q "Or worse" is?
A Red zone.
Q And what happens if you are in the red zone?
A You have to also try to rectify the problem by building what's called a rehabilitation plan.
MR. RICHMAN: I just want to take one minute.
(Pause.)
BY MR. RICHMAN:
Q Ms. Egan, can you give us a range

of what a reasonable estimate would be for an investment assumption for the Pension Fund?

MR. MILLER: Objection. When?

MR. RICHMAN: Let's take May 31, 2009.

ARBITRATOR IRVINGS: Give me the question again, please.

BY MR. RICHMAN:

Q Can you give us a range for what a reasonable estimate would be for an investment assumption for the Pension Plan as of May 31, 2009?

A That's difficult to say without looking at anything.

MR. MILLER: Objection. Based on what she said, it's necessarily going to be speculation from here on out.

ARBITRATOR IRVINGS: Yeah, doesn't help me.

MR. RICHMAN: Okay. I think that's it.

MR. MILLER: Take five minutes

and I'll come back for redirect questions.

(Pause.)

MR. MILLER: Back on the record.

REDIRECT EXAMINATION BY MR. MILLER:

Q Ms. Egan, in the testimony that you just went through with Mr. Richman, I think you testified that there was some correspondence from the Fund that led you to believe that shifts were CBUs.

Do you remember that testimony?

A Yes.

Q Can you identify the correspondence from the Fund that led you to believe that shifts were CBUs?

A Whatever information we received from the Fund administrator regarding the base units he would give in shifts.

Q Are you referring to the wage rate information that we previously looked at?

A He would give us shifts when we asked for base units.

Q In connection with your preparation

of withdrawal liability assessments, did you ask for shifts or did you ask for base units?

A We asked for base units that were shifts.

Q Shifts. Correct?

Correct?

A Yes. We would say base units/shifts.

Q You would say base units slash shifts?

A Yes.

Q I think you also testified in connection with Mr. Richman's questions that the word or term "shifts" was mentioned at trustee meetings.

Do you remember that testimony?

A Yes.

Q Was the discussion or mention of shifts at these meetings discussed in connection with discussion of CBUs?

A There would be for different reasons we'd hear "shifts." Whatever the discussion was on withdrawal liability or

the discussion was on audits that were maybe made on an employer on how their contributions were made.

Q So shifts would come up in the discussions about audits of contributions?

A Yes.

Q And in connection with discussions of withdrawal liability, how did the subject of shifts come up?

A Like the one example was El Diario when discussion was had about possible partial withdrawal, there was discussions about tracking the shifts.

Q And that was in connection with El Diario?

A Yes.

Q Do you remember it being in connection with any other employer?

A Not exactly off the top of my head.

Q Now, you were also asked the question about what is your understanding of a contribution rate.

Do you remember that?

A Yes.

ARBITRATION - VOLUME III

Q In your judgment, does a contribution rate have to be expressed as a dollar figure?
A My understanding is that dollars are being put into the Pension Fund.
Q That's not the question I asked.
My question was: Is it your understanding that a contribution rate has to be expressed as a dollar figure?
A I would think it would be in most cases.
Q Do you think it has to be in all cases?
A I don't know how else it would be expressed.
Q Okay.
So your testimony is you think a contribution rate in all instances has to be expressed as a dollar figure, correct?
A I'm not sure how else it would be expressed.
Q You went through a number of older withdrawal liability assessments and estimates of withdrawal liability with

ARBITRATION - VOLUME III

Mr. Richman.
And in those withdrawal liability assessments or estimates in which the payment schedule was based on shifts, the Fund office had provided you with the wage rate information, correct?
A Yes.
Q But in providing the estimates for The New York Times, the Fund office did not provide you with the wage rate information, correct?
A Yes.
Q Why don't you turn your attention to Exhibit 99, which we previously -- which you previously went over with Mr. Richman. It was a withdrawal liability estimate for Raritan.
Was this withdrawal liability estimate prepared in connection with a possible partial or a complete withdrawal?
A My understanding, it was a complete withdrawal.
Q And then the very next exhibit is the withdrawal liability calculation for the

ARBITRATION - VOLUME III

Daily Racing Form.
Was that a partial or complete withdrawal?
A Which exhibit?
Q Daily Racing Form is 100.
A Oh, okay.
My understanding, this is a complete withdrawal.
Q And the very next exhibit is Passaic County News. Obviously, that would be Exhibit 101.
And was that withdrawal liability calculation based on a partial or a complete?
A My understanding, it's a complete.
Q In fact, in connection with all of the withdrawal liability estimates or assessments that you went through other than El Diario, all of them related to complete withdrawals, correct?
A Yes.
Q And in the context of a complete withdrawal, the only consequence to the withdrawing employer of using shifts as CBUs

ARBITRATION - VOLUME III

as opposed to wages would be in connection with the payment schedule calculation, correct?
A Yes.
Q But in connection with a potential partial withdrawal based on a 70 percent decline, the use of shifts as opposed to total wages could indeed determine whether there was a partial withdrawal, correct?
A Under the 70 percent decline?
Q Yes.
A Yes.
Q So in the context of a partial withdrawal, use of shifts as opposed to wages as CBUs had a much greater consequence, correct?
A Yes.
Q Getting back to complete withdrawals and the determination of a payment schedule in connection with a complete withdrawal, do you know whether the consequence of using shifts rather than wages as CBUs would be more or less helpful to the employer in connection with the

ARBITRATION - VOLUME III
payment schedule?
A I have no idea, more or less.
Q And by "more or less," I meant, would it result in a higher quarterly payment or a lesser quarterly payment?
ARBITRATOR IRVINGS: I'm not understanding the question. Take me through it again.
MR. MILLER: Sure.
BY MR. MILLER:
Q In connection with the development of a quarterly payment schedule, that payment schedule has to necessarily be based on CBUs, correct?
A Uh-huh.
Q And do you know whether use of shifts as opposed to wages would ordinarily in connection with this Fund result in a higher or a lower quarterly payment amount?
A I don't know that I could tell it would be one direction or the other.
Q Okay.
Now let's turn to Exhibit 107, which is the withdrawal liability for

ARBITRATION - VOLUME III
El Diario which you briefly discussed.
And am I correct that withdrawal liability calculation for El Diario was in the context of a possible partial withdrawal?
A Well, no, it was a calculation. We were asked just to do a complete withdrawal.
Q But you referred to a trustees meeting in which the subject of a partial withdrawal by El Diario did come up, correct?
A Yes.
Q And that discussion at that trustees meeting about a possible partial withdraw was in connection with a partial withdrawal relating to a 70 percent decline in CBUs, correct?
A Whether they thought the 70 percent decline was a possible reason, I don't know, but it was brought up that the shifts should be looked at. And that's what you would do when you do a 70 percent decline.
Q And, indeed, you testified that there was a discussion at that trustees

ARBITRATION - VOLUME III
meeting about the need to track shifts, correct?
A Yes.
Q Did Mr. Urbank attend that trustees meeting?
A Most probably.
Q Were minutes taken at that trustees meeting?
A I would expect them to be.
Q Do you have any reason to believe that minutes were not taken at that trustees meeting?
A I have no reason to believe they weren't.
Q Finally, I want to discuss your testimony with Mr. Richman regarding the investment return assumption of 7.5 percent.
Am I correct that you discussed that -- strike that.
Am I correct that the 7.5 percent investment return assumption fell within a best estimate range? Was that your testimony?
A That when we're doing our analysis,

ARBITRATION - VOLUME III
it's a range that you are looking at and you are picking a number in the range.
Q In connection with the selection of the 7.5 percent, did you select that percent within a range?
A At that point in time, yes.
Q So did you actually calculate a best estimate range?
A I don't remember off the top of my head exactly what happened in 2011 as far as exact calculation.
Q So you can't remember whether, in fact, you calculated a best estimate range and then selected 7.5 percent from within that range, correct?
A There's an analysis done and whether we determined a specific range, whether a specific exact range was determined, I can't say exactly what the range was.
Q So I want to see if I can get the record clear on this.
Am I correct that you cannot remember whether you either calculated a

ARBITRATION - VOLUME III

range and then selected 7.5 percent within that range or merely selected 7.5 percent as the best estimate, correct?

A Say that again.

Q Am I correct that you cannot remember whether you either calculated a range and then selected 7.5 percent within that range or merely selected 7.5 percent as your best estimate?

A In 2011?

Q Yes.

A Yes.

Q Yes, meaning you can't remember?

A Yes.

MR. MILLER: Mr. Arbitrator, I do not have any additional questions.

But I do want to advise you and Mr. Richman that in all probability, we're going to file a motion to strike Ms. Egan's testimony respecting what occurred at that trustees meeting involving the discussion of El Diario on the ground that we requested minutes that would have encompassed the minutes of

ARBITRATION - VOLUME III

that meeting. And we were not provided those minutes, nor were we provided with a list of attorney/client protected information.

So we may well file a motion to strike and I'll lay it all out for you, and then the Fund can obviously reply in due course.

MR. RICHMAN: If he wants to file a motion to strike, I can't stop him.

But the minutes were not provided. The fact is that both parties were asked to provide minutes, and I'm happy to address this in a response to his motion. It's probably better than doing it right now while we have an hour and a half left.

ARBITRATOR IRVINGS: That's fine.

Thank you.

MR. MILLER: Thank you.

ARBITRATOR IRVINGS: Do you have anything further?

ARBITRATION - VOLUME III

MR. RICHMAN: No, I don't.

So we had a discussion with you about Ms. Albergo, and what you said during that conference call was that at that point in time that you were not going to issue a Subpoena for Ms. Albergo, that it could be -- and your words were "revisited" and that you suggested that the parties attempt to work out a stipulation to avoid the necessity to bring in Ms. Albergo.

And what we did is Mr. Miller or his group gave us a stipulation. We provided a counter-stipulation. No one is going to be shocked to hear that the stipulations didn't match up and didn't deal with an issue that we would like her to testify about.

What I offered to Mr. Miller about right after the last hearing date, I said to him -- and I actually wrote a letter, so we'll get the letter and have it exactly.

So the essence of the letter is we

ARBITRATION - VOLUME III

have six weeks before March 26th, and you can go, if you want to depose Ms. Albergo, we have found her now and we'll attempt to make her available to you for a deposition. And what it says specifically -- and this is an e-mail on 2-12-2015. And part of it is an e-mail from --

ARBITRATOR IRVINGS: Let me ask you because I'm getting anxious. We have her here. Is there any chance we can do this by phone tomorrow?

MR. RICHMAN: Yes.

MR. MILLER: Yes.

MR. RICHMAN: Not tomorrow.

MR. MILLER: I'm available Thursday.

MR. RICHMAN: The rest of the week I'm toasted. And I mean toasted.

ARBITRATOR IRVINGS: When can you do it?

MR. RICHMAN: I can do it next week. Monday.

MR. MILLER: Monday.

ARBITRATOR IRVINGS: I think Monday works for me.

MR. MILLER: Let's make it 4:30 on Monday.

ARBITRATOR IRVINGS: Just send me the documentation. You don't need cover e-mails. We'll do it on the phone.

ETHAN EMANUEL KRA,
having been first duly
affirmed by Arbitrator Irvings, was
examined and testified as follows:

DIRECT EXAMINATION BY MR. RICHMAN:

Q Can you state your full name for the record, please.
A Ethan Emanuel Kra.
Q Can you give us a brief review of your work history?
A Working backwards, I'm currently the principal of Ethan E. Kra Actuarial Services LLC since September 2011.
Previous to that, I was with Mercer which underwent various names over a

34-plus-year period. I was with them from May of 1977 through August of 2011. During the last 17 and a half years, I was the chief actuary of the US retirement business. And my last title was senior partner.
Prior to that, I was with Prudential Insurance Company of America for just under four years.
Prior to that, I was in graduate school at Yale University where I also taught calculus.
Q Okay.
A I don't think you want anything further back.
Q No, I don't want to know any lawn mowing jobs.
Can you give the Arbitrator a brief discussion of your education.
A Bachelor, BA, MA, MPhil and Ph.D., all in mathematics from Yale University, summa cum laude and phi beta kappa honors with exceptional distinction in mathematics.
Then I became a fellow of the Society of Actuaries. A member of the

American Academy of Actuaries and enrolled actuary under ERISA. Fellow of the Conference of Consulting Actuaries. A Chartered Enterprise Risk Analyst. And recently became a fellow of the College of Pension Actuaries of ASPPA.
Q Is that it?
A Well, there were a few others, but we can leave them out.
Q Have you worked with multiemployer pension plans?
A Yes.
Q And can you give us a brief discussion of plans that you worked with?
A I worked on the United Mine Workers 1950 plan and 1974 plan, both pension plan and the health and welfare fund back starting in around 1978 or so, 78/'79 through somewhere around 1984.
I've worked on the UFCW Local 1262 Nonfood Pension Fund for close to a quarter of a century.
I worked on the UFCW Local 1262 Food Pension Fund for almost a decade.

I worked on the District Counsel 37 Culture Institutions Health and Security Trust Fund for about 20 years.
I worked on the New York City Carpenters Pension Fund for a number of years.
In addition, I advised Mercer's corporate clients on issues dealing with multiemployer pension plans.
I also, as chief actuary, was responsible for the internal quality control audits or reviews of the practice around the country, which include auditing of multiemployer pension plan relationships and actuarial work.
As chief actuary, I was also responsible for creating some of the intellectual capital relating to Mercer's internal policies on dealing with multiemployer pension plans, among other types of plans.
Q Okay.
Now, how many actuaries did Mercer have on the pension side when you were the

ARBITRATION - VOLUME III

chief actuary or during the time you were the chief actuary?
A Sorry. I don't have numbers. I would have to estimate somewhere, in the US-enrolled actuaries, around 400.
Q Okay.
A But that's an estimate. There were about 4,000 active actuaries in America, and Mercer had about 10 percent of them.
Q Have you testified in withdrawal liability arbitrations previously?
A Yes.
Q Can you just tell us how many without going through them?
A Oh, well, it would help if I could have the list of cases from my report.
Q Okay. Let me show you Exhibit 11.
A Going down the list --
Q And where are you looking?
A I'm looking at Exhibit C, which is the last two pages of the exhibit, where I've actually testified where there were multiemployer issues involved.
If you go down to The Matter of

ARBITRATION - VOLUME III

Arbitration between Local 863, I testified in an arbitration and that dealt with withdrawal liability.
You only want testimony, not depositions, I assume?
Q Anything.
A Waste Management was a deposition dealing with withdrawal liability.
On the second page, the second case, Croop, C-R-O-O-P, dealt with withdrawal liability. I don't recall the details of the case. It was over a decade ago and it was just an expert report and we never got beyond that.
And the last case, Vornado versus Trustees, were affidavits and depositions. I don't believe I was ever deposed. And that was a case involving withdrawal liability and partition.
Q Now, did you prepare Exhibit 11?
A Yes.
Q And did anyone provide you assistance in preparing Exhibit 11?
A I may have had assistance with

ARBITRATION - VOLUME III

fixing up some typos, but they didn't catch them all. And my apologies. And I did have my report peer-reviewed by a colleague, another actuary. My policy is that I will not issue a report without having another actuary review the report to make sure it makes sense, holds together. And he found some -- he did catch some of the typos.
He will often point out that something that he reads he doesn't understand why I said and he needs me to clarify it, but there were no substantial changes to this report.
Q Let's take a look at Exhibit 9.
Have you seen that before?
A Yes, I have.
Q And what is that?
A That is the Revised Expert Report of Darren French, which I received after I prepared my report.
Q And did you review the revised report of Darren French?
A Yes, I did.
Q And you heard him testify at his

ARBITRATION - VOLUME III

deposition?
A Yes, I did.
Q And did you hear him testify at this hearing?
A Yes, I did.
Q What is the standard for determining whether actuarial assumptions are appropriate for calculating withdrawal liability?
A If I could refer to my report, I think I cite the relevant section.
ERISA 4213, which is cited on Page 6 of my report in Tab 11.
Section A describes actuarial assumptions. And they must be assumptions and methods which in the aggregate are reasonable, taking into account the experience of the plan, reasonable expectations which in combination offer the actuary's best estimate of anticipated experience under the plan, or actuarial assumptions and methods set forth in the corporation as regulations for the purpose of determining an employer's withdrawal

ARBITRATION - VOLUME III

liability.

Q When the term "corporation" is used there, do you know what that refers to?

A The Pension Benefit Guarantee Corporation, an agency of the United States government.

Q Sometimes called the PBGC?

A Yes.

Q And so has the PBGC set forth regulations for determining an employer's withdrawal liability -- for determining the actuarial assumptions and methods used in determining an employer's withdrawal liability?

A Absent a mass withdrawal, they have not issued any regulations for the actuarial assumptions on a withdrawal liability.

Q Does this provision in 4213 -- let me strike that.

How are you familiar with Section 4213?

A I had to use that when I was an actuary handling multiemployer pension plans and when I advised corporate clients on

ARBITRATION - VOLUME III

dealing with multiemployer pension plans when they were looking at withdrawal liability assessments or potential withdrawal liability.

Q Okay.

And in your opinion --

A Can I finish?

Q Sorry.

A I also had to read it and learn it when it was enacted because I was working on United Mine Workers at the time and we had to explain and figure out how that would affect that large pension plan.

Q In your opinion, does 4213A require an actuary to use the same interest assumption for calculating withdrawal liability as the assumption for investment returns?

A No.

Q And why not?

A Doesn't say to. There's nothing there that says to.

Q Now, you mentioned assumptions that are used for calculating withdrawal

ARBITRATION - VOLUME III

liability.

What is the standard with respect to each individual assumption for withdrawal liability?

A Under ERISA, ERISA requires that the assumptions and methods in aggregate are reasonable and in combination of the actuary's best estimate of anticipated experience under the plan.

There is no specificity here on individual assumptions.

Q In developing your expert opinion in this case, did you review the assumptions used by the Pension Fund's actuary to calculate withdrawal liability?

A Yes, I did.

Q And what assumptions did you review?

A If you go further into the report, I -- starting on Page 9, I did an analysis of the interest rate used to discount the liabilities.

Starting on Page 13, I did an analysis of the Mortality Table.

ARBITRATION - VOLUME III

On Page 14, I analyze spouse age, in other words, the relative ages between husbands and wives.

On that same page I analyzed percent married.

And then the other demographic assumptions were analyzed in the aggregate because I did not have enough data about the demographics of this -- the group of participants in this Fund to do a specific analysis, but I was able to analyze them in the aggregate by looking at other information in the actuarial valuation reports.

And that's described on Pages 14 and 15.

Q Let's see if we can go through the different assumptions that you looked at.

You said you looked at the interest assumption.

A Yes.

Q And what was your conclusion about the interest assumption?

A The interest assumption that was

ARBITRATION - VOLUME III

used was a blended rate by the actuary, 7 and a half percent for some of the liabilities, 5.50/5.02 percent depending on duration for others of the liabilities.

I estimated that that assumption even independently would have fallen within the best estimate range required as described in the actuarial literature, actuarial standards of practice and the guidance given by the American Academy of Actuaries Pension Council on selection of economic interest rates and that the assumption was in the best estimate range.

I did more analysis and looked at what current interest rates were at that time, market interest rates.

And depending where in the risk spectrum one were going to look at the interest rates ranging from Treasuries to corporates, there was somewhere between 3 and a half to 7 percent, but more in the middle of that range would have been an interest rate based on relatively risk-free bonds or financial instruments.

ARBITRATION - VOLUME III

Q So you mentioned the phrase "best estimate range" required as described in the actuarial literature, actuarial standards of practice and the guidance given by the American Academy of Actuaries Pension Council.

So let's see if we could take these one by one and tell us, if you could tell us, what is the best estimate range required as described in, first, generally, actuarial literature?

A Well, we would start with Actuarial Standard of Practice 27. I believe it's one of the documents, if we could tell me which number.

Q Ten.

A Ten.

On Page 2, Section 2.1, best estimate range is defined for each economic assumption. "The narrowest range within which the actuary recently anticipates that the actual results compounded over the measurement period are more likely than not to fall."

ARBITRATION - VOLUME III

So it's the narrowest range over the measurement period where you have 50 percent of the results falling when you do some type of stochastic modeling.

And then the practice note issued by the Pension Practice Council of the American Academy of Actuaries actually went through a derivation explaining to the actuaries how this could actually be calculated.

And generally --

Q Go ahead.

A And, generally, it's between the 25th and 75th percentiles of the distribution stochastic model.

Q And did you participate in that practice note?

A Yes. My name is actually on the practice note. I was on the Pension Practice Council at the time. I don't recall if I was vice-chair or just a member.

Q When you say in general it's between the 25th and 75th percentile, can you explain what that means?

ARBITRATION - VOLUME III

A The fund has different types of investments. They may have some international equity, domestic large cap, domestic small cap, value funds, growth funds, real estate, money market funds, short-term bond funds, long-term bond funds, international, high risk, all different types of investment classes. Every investment class.

Economists or market specialists based on various models would be able to determine the expected return, the geometric mean of return over a period of time. Most actuaries would use something like 30 years as the measurement period for the model, some may use 20.

And then you have a standard deviation, and that gives a range of results.

And then there are correlations of return between the different asset classes so that when some asset classes go up, others will generally go down. Others will go in sync.

ARBITRATION - VOLUME III

So a model will have the correlations, the geometric means as well as the standard deviations for the different asset classes and, whether it does it using mathematic formulas or stochastic model, will then model out the range of scenarios that can ensue and rank them from bottom to top.

And then you get percentiles. You find where the 5th percentile is where they're 5 percent below and 95 percent above, and that's the 5th percentile.

The 25th percentile is where 25 percent are below and 75 percent are above.

And the best estimate range is -- in the practice note is generally going to be the 25th to 75th percentiles of that range of possible outcomes for the particular asset mix.

Q Okay. Can you just tell us what a stochastic model is?

A Stochastic model is something where it's equivalent of running a thousand or ten

ARBITRATION - VOLUME III

thousand scenarios, where you're effectively rolling the dice or taking a random number generated as CBUR (ph.) from the spectrum for each individual outcome such as for the bonds or for the CPI or for the international equities.

And then you get one scenario, one model running out for the 30 years. And then you redo it again on another scenario, and you run all the different scenarios and get the results over a 30-year period, what the compound effect of return is in each one of those scenarios, and then you rank them.

And that's the output of a stochastic model. Sometimes they're called Monte Carlo models.

It's a way of looking at the data to see what is the range of possible outcomes.

Other times people will do it using the mathematic formulas that could be derived from the different inputs to actually just get it out exactly mathematically.

ARBITRATION - VOLUME III

There are three different approaches.

Q And, well, I'll tell you what. Let's go to the mortality assumption.

You took a look at that.

A Yes. Page 13.

Q Okay. And what was your -- without going through your whole report, what was the conclusion you reached?

A The conclusion I had was that for the May 31, 2009 liabilities, they were pretty close. There were two assumptions, two aspects of the assumption that were off but they were somewhat offsetting.

One is it did not reflect the blue-collar nature of the workers which would give us anticipated higher mortality and did not reflect mortality improvements from 2000 to 2009, nor any expected mortality improvements from 2009 to actual experience over the ensuing lifetimes of these individuals.

And the two factors of not projecting the mortalities improvements and

ARBITRATION - VOLUME III

not reflecting the blue collar, I thought it would be pretty close to offsetting each other. So the Mortality Table was pretty close to spot on.

Q Okay. And what about the spouse age?

A Spouse age was right in the middle of the age where actuaries have the assumption. Absent data of the individuals in this plan, I would say it's a very reasonable assumption.

Q And what about percent married?

A Percent married, I believe the actuary understated the percentage married within the population. Under normal circumstances, that would slightly understate the liabilities.

Because this plan has a death benefit with respect to nonmarried individuals, the amount of understatement becomes much smaller, but there is a small understatement of liability.

Q Okay. And the other demographic assumptions?

ARBITRATION - VOLUME III

A When I looked at the history of the demographic experience in the valuation reports over a nine-year period, I had to exclude two of those reports because of extraordinary events that occurred during the year.

There were demographic items such as a major shutdown which led to a turnover of population, people terminating employment that would not be in the norm over time.

And the other was a death audit where they went through and actually checked to make sure that all the retirees were alive and nobody was cashing checks. So it's a death audit.

And they found a fair number of people who were dead that they did not know they were dead, and as a result the liabilities went down. So that's a nonrecurring event that the actuary could not anticipate.

So excluding those two years and looking at the other seven years, the actuarial demographic experience was very

ARBITRATION - VOLUME III

close to a wash, which would mean that the assumptions in the aggregate for demographics were pretty close to spot on, with one exception. There was no allowance for mortality improvements from the date of the valuation to the expected for the rest of the life expectancy of the participants.

So to that extent, there was a few percent understatement of plan liabilities.

Q Okay.

Did you reach a conclusion as to whether the actuarial assumptions in the aggregate used by the Segal Company to calculate The New York Times' withdrawal liability were reasonable?

A I believe they were reasonable in the aggregate.

Q Now, Mr. French testified that the Segal blend method is unreasonable because it does not use a fund's investment return assumption to calculate withdrawal liability.

Do you recall that?

A Yes.

ARBITRATION - VOLUME III

Q And it's also in his Exhibit 9 -- not his Exhibit 9, in Exhibit 9 which is his report.

Do you agree with his opinion?

A No.

Q Why not?

A There's no requirement that the two assumptions be the same.

Q And let's take a look at ASOP 27.

A Which is Exhibit 10?

Q Yes.

And can you tell us in looking at the ASOP 27 why it is your opinion that the investment assumption and the interest assumption for calculating withdrawal liability don't need to be the same?

A Well, first of all, ASOP 27 has a Section 3.3, General Considerations.

"The actuary should consider the following folks when identifying which types of economic assumptions to use for a specific measurement and when selecting those economic assumptions that will be used, A, the purpose and nature of the

ARBITRATION - VOLUME III

measurement."

So if you have two measurements of the same cash flow stream which have different purposes and different natures, perforce you may have different assumptions.

Q Okay.

And how does that apply to the issue of using an interest assumption that's different than the investment return assumption for calculating withdrawal liability?

A When you have withdrawal liability, the withdrawing employer is given a final number with no risk.

If the investments underperform, you cannot go back to that withdrawing employer with another bill.

If the investment is outperforming, the withdrawing employer gets no credit.

But it is a final settlement of an obligation to provide for certain benefits.

In an ongoing plan, all of the ongoing employers share in the upside, share in the downside.

If the fund underperforms, they pay more. If the fund overperforms, they pay less. They take risk, they take the benefit.

With withdrawal liability, the withdrawing employer has no risk and has a fixed schedule to pay for fixed benefits.

Q And are you familiar with the concept of risk premium?

A Yes.

Q And what is that?

A Risk premium is the higher expected return one gets on risky investments.

Equities have higher expected return than bonds. Equities have higher risk.

If you have US Treasuries, ten-year Treasuries, they will pay coupons for ten years and pay off in ten years. You assume the United States government will not default. Never has.

Equities, stocks go up, stocks go down. Some companies go out of business. If you bought Enron in 2000, you could paper

your walls with your stock certificates.

So because there's risks, the market demands a higher expected return. Where there's no risk, the marketplace will accept a lower return on the investment.

A thousand dollars' worth of stock and a thousand dollars' worth of bonds can both be bought for a thousand dollars. The bonds have a lower expected return, the stocks have a higher expected return. They're both worth a thousand dollars.

Q Okay.

How do you determine what the cost of the price of risk is?

A I don't. The market does.

Q Okay. How does it do that?

A Through the marketplace, through the stock markets, the bond markets, Wall Street.

So you have an investment, the market equilibrium will set a price for that investment.

If you have -- let's compare two bonds, a junk bond and a Treasury. One's a

riskier investment than the other. It has a higher expected return, even after allowing for the default risk.

And if you were to take the expected cash flow, adjust it for default on the junk bond and discount that back to today, the Treasury rate, you would get a higher value than the Treasury. That difference is the risk premium.

Q Okay.

Why should employers who withdraw, as I understand from your testimony, not get any benefit from the risk premium?

A A withdrawing employer has not borne the risk, will not pay more if the investments do poorly.

If an employer withdrew in 2000, January 1, 2000, and paid its withdrawal liability based on bonds, the fund could have bought bonds and had no risk.

If the fund bought equities, the fund had risk and the employers who were continuing to contribute deciding effectively to take that risk, good or bad,

in fact over the past 15 years, they've lost the bet.

Q Who's lost the bet?

A The ongoing employers have lost the bet and they have to contribute more.

Had the market done well, they would contribute less. They're taking all of the downside for which they get the upside.

Otherwise, there's an arbitrage that the exiting employer is benefitting from.

Q Okay.

Does the Segal blend penalize withdrawing employer by using a lower interest rate in today's interest rate environment for calculating withdrawal liability?

A I believe the Segal blend method benefits the withdrawing employer because it doesn't use the market interest rate for the entire liability.

Q And why is that?

A Because the Segal blended method in

The New York Times -- I forgot whether it was 52/48 or 48/52, but for about half the liabilities, it used a market interest rate, and for about half the liabilities, it used the valuation 7 and a half percent interest rate.

A fair, equitable settlement would have been using the market interest rate for the entire liability in assessing the withdrawal liability.

So Segal actually came up with a lower withdrawal liability than a true market-based calculation.

So in the exiting from this Fund, The New York Times was able to put risk on the remaining employers.

Q Okay.

Let's take a look at 3.6 of ASOP 27. That's Exhibit 10.

A Okay. Page 5?

Q Page 5. Yes.

Are you familiar with 3.6?

A Yes.

Q I'm not going to ask you to read it

and I'm not going to read it, but can you summarize very briefly what it says?

A It says -- it's discussing the investment return assumption and the discount rate assumption. Where the investment return anticipates returns on the plan's current and future assets, discount rate is used to determine present values of future payment streams.

It says generally but not all cases, the appropriate discount rate is the same as the investment return assumption. There are cases where it will not be. And this paragraph gives two examples where it may not be, but they are not the exclusive examples.

Q How do you know they are not the exclusive examples?

A First of all, it says for some purposes. It doesn't say for these purposes or something else exclusively.

I mean, if they were the only two, I think the language would have been different. The drafters of ASOPs are very

meticulous in their choice of language, having been on one of the committees of ASOPs. There are a number of ASOPs where my name appears, and I know how careful the committees are in the wordsmithing of these ASOPs.

So if it says for some purposes, it does not mean exclusively only for those purposes.

Secondly, in Section 3.6.2, construction being the investment return range, it describes two very different methods which can be used.

And the cash flow matching method is very comparable to the method I described which would be how I would select the withdrawal liability discount rate.

There are a number of situations. For example, FAS 35, Statement of Financial Accounting Standards Number 35, which has subsequently been renumbered and don't ask me the new number, which allows as interpreted by the audit profession either the expected rate of return on assets or a

settlement of bond-type rate but nothing in between, according to many auditors.

Q Okay.

So Mr. French has opined that the use of the investment assumption to calculate withdrawal liability neither advantages or disadvantages a withdrawing employer, or the Fund for that matter, because there is the same chance that the Pension Fund is going to earn an investment return above or below the interest assumption.

Do you agree with that statement?

A I unequivocably disagree.

Q And why is that?

A Let's consider May 31, 2009. And for argument's sake, let's assume that the PBGC rate was the market rate. And for simplicity, we'll take the 5.50 percent that they used for the first 20 years as if it were for all years. Not saying that's the number but just for simplicity.

That would indicate that you could essentially buy bonds or other defeasement

ARBITRATION - VOLUME III

instruments which could settle the obligation for the portion of the liability attributable to The New York Times.

To the extent that you took any other investment portfolio and looked to do the following: I'm going to invest in whatever the Fund is investing in, but I want to buy insurance that covers all of the downside below 5 and a half percent. What would it cost me?

If I were to sell to somebody else all of the upside above 5 and a half percent from this portfolio, the two numbers would exactly balance each other out because that's the marketplace for valuing risk, valuing the variability of investments.

So the marketplace price for insuring the 5 and a half percent, given how I'm investing, the market would charge me a price for giving up all of the upside 5 and a half percent, one hundred percent of the upside.

Q I just want to make sure I understand what you are saying.

ARBITRATION - VOLUME III

So is it your testimony that the market would take all of the upside and charge you a price in addition to that?

A The market would charge me all of the upside, and that would equal what I have to pay for all of the downside protection.

The two absent frictional costs, brokerage commissions, things like that, the buy/sell spreads, the two would cancel each other out assuming the 5 and a half were the correct marketplace interest rate.

Q And 5 and a half marketplace interest rate for?

A PBGC is indicating that that's the marketplace interest rate for these liabilities at that date.

Q What about a 7 and a half percent assumption?

A If I wanted to buy insurance against everything below 7 and a half and give up everything above 7 and a half, I would give up everything above 7 and a half. And I would have to pay incrementally out of my pocket the difference between the present

ARBITRATION - VOLUME III

value of the cash flow stream at 7 and a half and the cash flow stream at 5 and a half.

All of that difference in present value would be the price I would have to pay in addition to the upside above 7 and a half to insure everything below 5 and a half.

I'm sorry. Back up.

To insure everything below 7 and a half, I would have to give up all the upside plus pay for the difference between 5 and a half and 7 and a half. That's what would it cost me to insure the 7 and a half.

So I would have to pay, give up all the upside and pay money to guarantee the 7 and a half. So I couldn't buy 7 and a half in the marketplace with no cost.

Q What is a Bader Swap?

A Bader Swap was popularized in literature by Larry Bader, a well-known actuary who spent nine years at Salomon Brothers under Marty Leibowitz, under Henry Kaufman writing research papers.

Marty Leibowitz went over

ARBITRATION - VOLUME III

to Tiaa-CREF, and Henry Kaufman was the one who called the market switch in 1982.

If I offered to give you a -- if I offer you a 20-year deal, I will give you one hundred percent of return on the S&P 500 on a million dollars.

In return, you are going to give me one hundred percent of return on one month's Treasuries for 20 years on a million dollars.

But, remember, on the S&P that I'm paying you, the market goes down, you gotta pay me.

So you are getting the full return on the S&P 500, good or bad, for 20 years.

The expectation is, let's for argument sake the S&P's expected to earn 8 percent over the next 20 years. And one month Treasuries, for argument's sake, are not going to be low like they are now but will be 3 percent for the next 20 years.

And, further, to make sure this is a good transaction, we each have humongous banks behind us guaranteeing that we'll make

ARBITRATION - VOLUME III

good on our commitments so it's not a promise that won't be kept.

So your expectation is you're going to make $50,000 a year, the difference between 8 percent and 3 percent, over a 20-year period on this million-dollar investment.

If I offered to enter into this transaction with you, what would you offer to pay me? Because this transaction is called the Bader Swap. I will give you the return on one investment, you'll give me the return on another investment. And it's a 20-year deal, we can't get out of it.

Most people would say, oh, I'm going to make $50,000 expected a year for the next 20 years, I should pay something for it. Maybe not the million dollars. Discount it, maybe some discount for risk whatever, but they'll pay me something.

The answer is if you are willing to pay me one dollar, you have overpaid because anything you pay me is pure profit, and I can guarantee that contract at zero cost.

ARBITRATION - VOLUME III

Why? If I'm going to give you the S&P 500, I'll buy a million dollars' worth of S&P 500. Whatever returns I give you, you are going to give me one month's Treasuries.

I sell one month's Treasuries short for a million dollars, and whatever you give me I pay the short. Where do I get the money to buy the million dollars for the S&P? From what I get by selling the Treasuries short.

So I'm at no cash Day One. I'm long S&P, short Treasuries because you are going to pay me to cover the short in the Treasuries. I'll pay you to cover the long on the S&P.

Every time that we have to settle up, whatever you pay me for the Treasuries, I give to the short market. Whatever I have to pay you on the S&P, I collect from the contract I bought.

So I'm just the middleman shuffling money between you and the marketplace. I can actually put this on autopilot and walk away. But whatever you paid me Day One, I

ARBITRATION - VOLUME III

put in my pocket, I walk away, pure profit.

The expected return on the S&P is 500 basis point greater than the expected return on the one-month Treasuries.

Yet ab initio, from Day One, the two have the same value because I can just swap them.

After 20 years, ex-ante, you can say, well, based on expected return, you should have done better. But you had risk where there are years S&P doesn't do as well, and they can be very long periods of time. From the years 1962 to 1982, the Dow Jones Industrial Average, before dividends, went up 16 percent, less than one percent a year. Bond prices did much better.

Q Thank you.

Let's go to Exhibit 12.

A This is a 2012 Form 5500.

Q And you see this is for the Consolidated Retirement Plan if you look on the front page.

A Yes, it is. Consolidated Retirement Plan, Line 1A.

ARBITRATION - VOLUME III

Q I would like you to take a look --

A Interest rate or the investments?

Q I'm looking at -- if you look at the end of the financials, and it's -- it's right after Page 24. It says Schedule MB, Line 11, "Justification for change in actuarial assumptions."

Do you see that?

A Yes.

Q And looking at that, can you tell us what -- for that year what the interest rate was used to calculate withdrawal liability?

A Yes.

Q And what was that?

A Six percent. The interest rate used to value vested liability for purposes of withdrawal liability determination was changed to 6 percent.

Q And can you take a look at the Form 5500, the Schedule MB, and tell us what was the interest assumption used for investment returns for that same year?

A On Schedule MB, Line 6D, "Valuation

ARBITRATION - VOLUME III

liability" --

MR. RICHMAN: Could you hang on a second. See if we can get everybody there.

A Next page, Line 6D, as in "David." "Valuation liability interest rate, 7 and a half percent preretirement, 7 and a half percent post retirement."

Q Okay.

Do you know what the effective interest rate that results from the use of the Segal blended method for calculating The New York Times' withdrawal liability?

A I cannot calculate it exactly because I don't have the data and because I haven't built the entire valuation software.

I was able to estimate it by looking at various documents and using various actuarial rules of thumb and estimation procedures.

I looked at the liability based at 7 and a half percent, and then I looked at the current liability based at another interest rate and determined the effect on

ARBITRATION - VOLUME III

the liability percentage-wise for every 1 percent change in the discounting rate.

I also looked at the Segal numbers, at the two different discount rates used in the withdrawal liability, which were the 7 and a half percent and the PBGC rates which effectively were between 5.4 and 5.5 percent, most of the liabilities at 5 and a half.

Only those payments that exceed beyond 20 years are being discounted at 5.2 but only for the period of 20 years. The first 20 years of every payment is at 5 and a half percent.

So the effective interest rate for the PBGC interest rate calculation was somewhere in the 5.4s. Looking at the 7 and a half and looking at the differences, I would say that the net effective rate -- the single interest rate that would give the liability used for withdrawal liability was close to 6 and a half percent.

Q Okay. And let's take a look at Exhibit 71.

ARBITRATION - VOLUME III

A Seventy-one. Red?

ARBITRATOR IRVINGS: You're right. Red.

THE WITNESS: Which Bates number?

BY MR. RICHMAN:

Q FUND-1580.

A This appears to be an exhibit that's attached to the auditor's report.

Q Okay.

A Or, actually, it may be a Schedule H, Line 4(i), or maybe just another exhibit supplement -- well, Page 1579 says Supplemental Information. And that's dealing with the auditor's report coming right after the notes, so I would infer that these are supplemental information from the auditor's report.

Q We did this math once before, and I'm happy to do it again if you want to go through it.

MR. MILLER: Just summarize the math. I can always cross-examine him on the math.

ARBITRATION - VOLUME III

MR. RICHMAN: I'm good with that.

MR. MILLER: I figured you would be.

BY MR. RICHMAN:

Q So I have, if you look on Page 14, and this is as of May 31, 2009.

I have 47.14 percent in equities. 46.7 percent in fixed income, and 6.07 percent in real estate.

With that asset mix, is the 7 and a half percent interest assumption a reasonable assumption?

A A 7 and a half percent discount rate or interest assumption, the interest assumption for expected return on assets would fall within the best estimate range within the 25th to 75th percentiles as of that date.

Q And where would it fall in the range?

A It would be approximately the 65th percentile as measured by the Mercer Portfolio Return Calculator.

ARBITRATION - VOLUME III

Q Can you tell us what the Mercer --

A The Mercer Portfolio Return Calculator.

Q Can you tell us what that is?

A When ASOP 27 that we looked at, the earlier version came out, the Pension Practice Council put out a practice note advising actuaries, helping them deal with the ASOP.

At that time, I was the chief actuary of Mercer and I had one of our investment consultants with some analysts put together a tool. It may have been Excel-based, but it got investment formulas using expected returns, geometric or arithmetic means, standard deviations and correlations to take various asset mixes and determine the percentiles that we discussed earlier.

And what I did was I called one of my colleagues who is at Mercer, my successor who is the chief actuary of the US retirement business. And I asked him to pull up the second calendar quarter 2009

ARBITRATION - VOLUME III

Mercer Portfolio Return Calculator, the assumptions that would have been used by an actuary at Mercer at that time.

The assumptions are updated roughly quarterly.

And to put in 47 percent equities, 47 percent mixed bonds and 6 percent real estate to assume 20 basis points of investment-related expenses, commissions, buy/sell, trust fees, things like that that reduce an investment return on a portfolio, and to run it.

And the results were a 50th percentile of 6.75 percent, approximately, and 7 and a half percent was at about the 65th to 70th percentile.

MR. MILLER: Mr. Arbitrator, I'm going to object at this point in time. And it is my opinion that based on Dr. Kra's deposition testimony, what he just testified to as to the results from application of this Mercer Portfolio Calculator were results that he conducted after his

ARBITRATION - VOLUME III

deposition and after his expert report.

And I specifically asked him at his deposition whether his expert report contained all of the opinions that he was going to testify to at this hearing and whether he was going to give any additional opinions.

And we can find the deposition testimony, but Dr. Kra testified at that time that his expert report contained all of his opinions.

If, in fact, the application of this Mercer Portfolio Calculator, which he's just testified to, was undertaken after his deposition, I would move that this testimony be struck because we did not have the opportunity to ask him about it at his deposition. And we're prejudiced by that.

This is, I believe, a post expert report and post deposition calculation.

MR. RICHMAN: This is a response to the testimony of the

ARBITRATION - VOLUME III

expert for The New York Times in terms of his talking about the return as 7 and a half being the number that the actuary chose and, therefore, it was accurate. And I think it is eminently reasonable to have Mr. Kra -- and it was done, by the way, after his report and his deposition -- to testify about what the rate would be.

MR. MILLER: I would point out that I believe Mr. French said he did not calculate a range in connection with his expert report.

But as Mr. Richman just confirmed, all of this was done not merely after deposition and after filing of the expert report and in conflict with his deposition testimony, but apparently it was done just within the last two weeks subsequent to Mr. French's expert testimony in this case. And it is thereby inherently prejudicial.

MR. RICHMAN: Well, he did,

Page 722

ARBITRATION - VOLUME III

Mr. Kra did testify -- Dr. Kra did testify at his deposition with respect to what he thought the rate would be. And we are just bringing it up right now.

ARBITRATOR IRVINGS: Well, is the issue here the testimony about the overall -- his calculation about a single effective rate would be 6.5 or that the 7.5, using the Mercer calculation, would be approximately 65 percent?

MR. RICHMAN: Well, his deposition testimony -- here's the deposition testimony, and if you want to read along, it's on Page 167 of Dr. Kra's testimony.

The question: "Fair point. In that regard, did you do a calculation to convert the liability result that Segal obtained to a single discount rate?

"I don't have the data for which to do so."

MR. MILLER: That's not what

Page 723

ARBITRATION - VOLUME III

I'm challenging.

ARBITRATOR IRVINGS: Ron, if I might.

What I'm understanding, they are not challenging his testimony about the 6.5 percent as a single effective rate.

They're simply challenging the use of the Mercer scale to place the 7.5 percent. And I'm not sure what that information does for me anyhow.

MR. RICHMAN: Okay. If it doesn't do anything for you, then I'm not going to press it.

MR. MILLER: Yeah, and we'll move that it be stricken.

MR. RICHMAN: That issue about the Mercer.

ARBITRATOR IRVINGS: The Mercer be stricken.

MR. RICHMAN: Okay.

BY MR. RICHMAN:

Q Now, Mr. French testified that he had not developed an opinion as to whether 6 and a half percent is a reasonable or was

Page 724

ARBITRATION - VOLUME III

a reasonable investment assumption for the Fund at this hearing.

Pages 173 to Pages 175 of the rough transcript.

And in your opinion, can Mr. French opine on whether the Fund's assumptions for calculating withdrawal liability are reasonable in the aggregate if he doesn't have an opinion as to whether the 6 and a half percent is a reasonable investment assumption for the Fund?

A Let me flesh that out.

I believe he testified that he had no difficulty with the demographic assumptions as being reasonable.

Given that, it would be impossible actuarially to opine that the assumptions are unreasonable in the aggregate if you have no opinion on the reasonableness of the investment return assumption of the interest rate.

MR. RICHMAN: And we can address it now or we can address it in papers, but we're going to move to

Page 725

ARBITRATION - VOLUME III

strike Mr. French's testimony completely because he did not opine on the ultimate question here.

ARBITRATOR IRVINGS: I'm sure I'll be getting motions and responses.

MR. MILLER: You'll be getting responses to said motions.

BY MR. RICHMAN:

Q There has been testimony at this hearing about the decline of the industry in which the participants of the Pension Fund participate.

And what effect, if any, should the client of the industry have on an actuary's choice of an interest assumption for calculating withdrawal liability?

A As the population declines, you have fewer and fewer bodies over which to spread or amortize the losses resulting from adverse fluctuations.

So if you have a large asset pool and only a handful of people and you lose 20 percent in the market one year and you

ARBITRATION - VOLUME III

don't recover for quite some time, and as a result you have to contribute more money to the pension plan to amortize those losses, if you have very few people, that would require a humongous contribution increase. It increases the risk to the plan to the point where the plan could no longer perhaps either increase contributions adequately and the plan could go bankrupt.

So as the number of contributing -- participants for whom contributions are being made shrinks, the risk to the plan increases. And as a result, at some point trustees would have to derisk in some respects.

And, in fact, I think I even had a comment about that in my report.

Q You did.

A On Page 12 of my report, Paragraph 42, "As of May 31, 2008, there were 1.28 nonactives," meaning retirees of vested returns -- "per active. As of May 31, 2010, only two years later, that ratio skyrocketed to 2.11, a 65 percent

ARBITRATION - VOLUME III

increase."

So now instead of every active participant covering all of the liabilities and gains and losses with respect to that person plus one and a quarter retirees, that active person had to cover themselves plus over two retirees or vested returns.

And that means there were substantially more risk, and the plan really has to take note of that.

Q Okay.

If you were the enrolled actuary calculating the withdrawal liability for The New York Times, what interest assumption would you have used?

A I would have used a bond-type interest rate for all of the liabilities. If I were using the PBGC interest rates for all of the liabilities, the effective rate would have been somewhere about 5.4, something in that range.

It would have been a relatively risk-free rate. It might have -- depending on the plan, I might have used PBGC. I

ARBITRATION - VOLUME III

might have used Treasuries. I would have to look at the duration of liabilities, the nature. But it would have been something in the 4s or 5s for the interest rate.

MR. RICHMAN: I have no further questions.

ARBITRATOR IRVINGS: Okay. Let me ask you this. Let's try and introduce some level of reality here.

I hate to say, you know, this is as we say in Boston, it's a shocka (ph.) that it's here and 20 of 4.

Realistically, how long do you think cross examination is going to take?

MR. MILLER: Realistically, at least an hour and a half if not two hours.

ARBITRATOR IRVINGS: There we go. So it doesn't make any sense for me to start this now.

MR. MILLER: I understand.

ARBITRATOR IRVINGS: We can go off the record.

We're done for the day.

ARBITRATION - VOLUME III

(Pause.)

ARBITRATOR IRVINGS: Are you available the next day of -- the 26th?

MR. MILLER: I'm on the West Coast Monday, Tuesday, Wednesday that week at an arbitration. At best, I can come back on the red eye, so I would not want to do it first thing in the morning.

If you have another witness to do --

MR. RICHMAN: Yeah, we can go to Urbank. We have to finish Urbank.

And then we can get in -- finish Urbank and Lewis and Barbara.

ARBITRATOR IRVINGS: That would be decided -- are you going to go one day or two days?

Is your mediation in New York?

MR. RICHMAN: Is it someplace good?

MR. MILLER: Boston.

ARBITRATOR IRVINGS: So we can

ARBITRATION - VOLUME III

start at 9:00 on the 26th.

MR. RICHMAN: Right.

ARBITRATOR IRVINGS: Where are we in Urbank's testimony?

MR. MILLER: I think we are pretty close to done.

We have about an hour or so, say an hour and a half to complete cross and redirect.

What do you think?

ARBITRATOR IRVINGS: Okay. So then who else do you have?

MR. RICHMAN: We're going to have to deal with that issue on Monday.

We also have an issue with respect to if it's decided we don't need to bring in other contributing employers or representatives of contributing employers, but we have collective bargaining agreements that have been objected to on relevance grounds.

And my suggestion would be we each argue relevance in the brief, and you'll

ARBITRATION - VOLUME III

tell us it's not relevant and we'll tell you why it is relevant.

MR. MILLER: It's beyond that.

Mr. Arbitrator, if you recall, you had indicated prehearing conflicts that to the extent that you wanted us to bring in representatives of other contributing employers, we needed to identify who they were and make offers the conclusion of the second day of the hearing if there is a predicate issue.

MR. RICHMAN: Well, we can also bring in Mr. Costello who is on our list who is a fund administrator, but I think it's a ridiculous waste of time.

The collective bargaining agreements of other contributing employers --

MR. MILLER: Which I don't think are relevant.

MR. RICHMAN: So we'll argue about relevance.

The collective bargaining

ARBITRATION - VOLUME III

agreements all have the same language.

MR. MILLER: No, they don't.

MR. RICHMAN: Well --

MR. MILLER: They don't.

MR. RICHMAN: The key language is all the same.

MR. MILLER: And we certainly don't know the procedures by which other employers made their contributions and the relevant statements that they made from those other employers that they understood the operative language to be. And I just quickly blurted out, "No, those bargaining agreements are not all the same."

So it just opens up an enormous can of worms.

And the reality is that if Ron had wanted to have testimony from other contributing employers, there was an opportunity earlier in this case to identify who he wants his potential witnesses to be and we could have deposed

ARBITRATION - VOLUME III

them and addressed that here, but the time for that has passed.

And as it relates to the relevance question, we believe that certainly the documents --

MR. RICHMAN: Excuse me --

MR. MILLER: -- has no relevance.

MR. RICHMAN: Look, the answer is pretty simple. The documents will speak for themselves. There's not an issue about whether they're authentic or not. Part of what The Times has been saying is, oh, okay, so you did all these calculations for withdrawal liability for all these other folks but that wasn't for The New York Times. And to the extent -- and the arbitrator will get to see the language -- to the extent the language is the same in the relevant portions that deals with that issue.

It is -- there is no prejudice to anybody to have these collective

ARBITRATION - VOLUME III

bargaining agreements come in and everybody argue about why the language -- that certain language is different and that's relevant or the language is the same as the relevant language; that's the point here.

MR. MILLER: And our view is the documents do not speak for themselves.

Indeed, the reason we're having this hearing is to try to ascertain what the meaning of The New York Times relevant bargaining agreement language was. We need to know what the process was for making contributions that these other employers may have engaged in, we need to have testimony from other employers about their understanding.

It is a dramatic expansion at this late date and I think at great prejudice to The Times to either let the documents in without that context going in directly. And to the extent that that context would be developed, it would

ARBITRATION - VOLUME III

expand this hearing in a dramatic fashion. And the time for making that position --

ARBITRATOR IRVINGS: The evidence we looked at the letters, for example, breakdown for competitors' relationships, isn't it arguably in your interest to see what the language says?

MR. MILLER: Well, most of the bargaining agreements that are on the objections that Mr. Richman wants to have come in are not related to those withdrawal liability assessments. They're from other contributing employers. And we will make arguments in our briefs about the assessments and the relevance and weight you should give to those assessments as a consequence of not having the appropriate testimony.

ARBITRATOR IRVINGS: Are these collective bargaining agreements and employers about whom I have no other

ARBITRATION - VOLUME III

evidence?

MR. RICHMAN: There are some. And there are those that are for the contributing employers for whom there is evidence.

ARBITRATOR IRVINGS: Okay. So let me say this: I would take the collective bargaining agreement exhibits and employers about which the calculations were done, but I'm not going to start expanding it for ones I don't have any other evidence on.

MR. RICHMAN: Okay.

MR. MILLER: That's fine.

$$$$$$$$$$$$

ARBITRATION - VOLUME III

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Page 738

ARBITRATION - VOLUME III

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ARBITRATION - VOLUME III

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ARBITRATION - VOLUME III

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Page 741

ARBITRATION - VOLUME III

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ARBITRATION - VOLUME III

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ARBITRATION - VOLUME III

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ARBITRATION - VOLUME III

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MR. RICHMAN: Okay.

MR. MILLER: That's fine.

(Whereupon, the proceedings were adjourned at 3:54 p.m.)

ARBITRATION - VOLUME III

I N D E X

E X H I B I T S

ARBITRATION - VOLUME III

C E R T I F I C A T E

STATE OF NEW YORK)
: ss.
COUNTY OF NEW YORK)

I, BARBARA R. ZELTMAN, Shorthand Reporter and Notary Public, within and for the State of New York, do hereby certify:

That this transcript is a true record of the proceedings had.

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 6th day of March, 2015.

____

BARBARA R. ZELTMAN
Court Reporter and Notary Public

ARBITRATION - VOLUME IV

AMERICAN ARBITRATION ASSOCIATION

---------------------------------------X

THE NEW YORK TIMES COMPANY,

Petitioner,

v.

NEWSPAPER and MAIL DELIVERERS'-PUBLISHERS' PENSION FUND,

Claimant.

---------------------------------------X

ARBITRATION

VOLUME IV

New York, New York

March 26, 2015

REPORTED BY: BARBARA R. ZELTMAN

Professional Stenographic Reporter

Job Number: 90463

ARBITRATION - VOLUME IV

March 26, 2015
9:28 a.m.

Arbitration proceedings held at American Arbitration Association, 120 Broadway, New York, New York, before BARBARA R. ZELTMAN, a Professional Stenographic Reporter and Notary Public within and for the State of New York.

ARBITRATION - VOLUME IV

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ARBITRATION - VOLUME IV

(Whereupon, the following proceedings were had:)

MR. MILLER: I want to begin today's hearing by making a statement and a motion as a result of The Times finally receiving certain trustee minutes over the weekend.

In our recent briefing respecting Rosana Egan's testimony, The Times expressed a concern that it was likely that the minutes supportive of The Times' position in this case had not previously been produced.

And what we have now learned is that this concern is quite warranted.

There are a number of separate set of minutes that are very supportive of The Times' position. And supportive of The Times' position, Mr. Arbitrator, on both of the issues in this case, the contract issue and the Segal blend issue.

And not only would we have put these documents in evidence, quoted from them in our opening brief, but more

ARBITRATION - VOLUME IV

importantly, we would have deposed a number of witnesses about these documents including potentially witnesses who have not testified. And we would then have used these documents in eliciting their hearing testimony.

And all of these relevant documents were responsive to our prior discovery requests and should have been produced back in the fall and prior to the deposition schedule.

Here's what we've also learned. We also learned that there are a number of additional documents that clearly exist. And the Fund has custody of specifically exhibits to the trustee minutes and trustee meeting agenda memos that are also potentially relevant and potentially helpful to The New York Times, and they have not yet been produced.

And, finally, we learned from the meeting minutes that we do have that there were other special meetings of the trustees for which the Fund has not

ARBITRATION - VOLUME IV

produced minutes as well as other possible meetings involving trustees that didn't rise to the level of a formal or special meeting.

And we need to have a thorough search done for these special meeting minutes and an opportunity to depose people about special meetings and other meetings and potentially have them testify.

I thought it would be helpful in demonstrating how probative these meeting minutes that we did receive are and helpful to The Times in its case if I went quickly through two examples. And I have a binder of the meeting minutes.

The first one I want to go through is under Tab 21, which are the minutes of a special meeting of April 18, 2011.

Mr. Arbitrator, if you look at the first page of that set of meeting minutes under the discussion of Funding Improvement Plan, and as you know there have been testimony about the Funding

ARBITRATION - VOLUME IV

Improvement Plan.

Under the first paragraph under that heading, there's reference to a Segal report that was discussed at this trustee meeting, and a copy of the Segal report is appended to these meeting minutes as Exhibit A. And we have not yet received that Exhibit A Segal report nor have we received any of the exhibits that were indeed attached to any of these sets of meeting minutes.

The more probative element of this set of meeting minutes is on the second page. And it would be useful I think if you turn to that page and focus on the bottom paragraph. There is a paragraph that begins "The Segal representatives and review ..."

And so this purports to be a discussion at this meeting by Segal of potential contributions that would be necessary in developing a Funding Improvement Plan.

And toward the bottom of that

ARBITRATION - VOLUME IV

paragraph, there is a sentence that begins "Under the scenario ..." And it says, "Under the scenario that took into account the adoption of this special funding relief measures, the default schedule would increase the employer contribution rate at the time of collective bargaining from 8 percent to 12.4 percent."

And later on it also makes mention of employer contribution rate, not rates, plural. And it refers to the rate as a percentage.

That's our theory. I mean, our theory is that the contribution rate under the bargaining agreement is expressed as a percentage. And if the contribution rate is expressed as a percentage and CBUs are necessarily because they have to be expressed in dollars and wages.

So this is a very probative document and very helpful to The Times' case, and as trustees meeting minutes it

ARBITRATION - VOLUME IV

ties the trustees to the concept of a contribution rate as a percentage.

And because we didn't have this document until this past weekend, we couldn't use it to support Terry Hayes' testimony on what constituted CBUs and what he learned at trustee meetings.

And we couldn't use it in the depositions of Rosana Egan and John Urbank on the issue of CBUs, and we couldn't use it in refuting Rosana Egan's testimony when she testified.

And, indeed, I think this documentary evidence does directly contradict her testimony that those people at the Fund always understood that the contribution rate was a percentage of the shift wage.

This document refutes that and we couldn't use it.

We also couldn't use it to refresh the trustees' recollection of what happened at trustee meetings regarding what the contribution was.

Page 756

ARBITRATION - VOLUME IV

The second of the two examples I would like to show you is at Tab 25.

Those are meeting minutes almost two years later in February of 2013, February 27, 2013, and you'll see under the first paragraph it says "Call to order." And, again, there is a mention of a Segal handout on funding plan projections, again attached and made part of the minutes of Exhibit A.

And as I said, we haven't receive any of those exhibits.

And if you turn to the third page, you'll see toward the bottom of the page, again there is a discussion of the Funding Improvement Plan and different objectives in order to develop it.

And under the Paragraphs 1, 2 and 3 there's reference to changing the contribution rate from 8 percent of what, of wages, to 11.8 percent of wages.

And, in fact, without belaboring it, this document on more than ten different occasions within the document

Page 757

ARBITRATION - VOLUME IV

refers to the contribution as a percentage of wages.

And, again, it ties use of the phrase "percent of wages" to the trustees since these were their minutes.

And my point here is not that there are arguments to be made about the implication of this, but that we didn't have a chance to use it in depositions and then at the hearing both, as I say, for our witnesses as well as in cross.

And you should be aware that the meeting minutes also speak of the 7.5 percent return and projections of 7.5 percent return for this particular portfolio for a number of years. And that the trustees at times also in the last several years started out changing the investment allocation mix and decided not to do that.

That's also helpful for The Times. It's also consistent with our views on the Segal blend. We couldn't use it to refute Rosana Egan on the Segal blend.

Page 758

ARBITRATION - VOLUME IV

So these are very helpful minutes that we had a right to and we have not been able to use thus far in the case.

There are additional documents that we glean as a consequence of these minutes that we know are in the possession of the Fund that we have not received.

I made mention of special meetings. In these minutes they make mention of some special meetings, and we don't have minutes of all of the special meetings.

And there are at least four separate special meetings referred to in the minutes we do have that we have not yet received minutes in connection with.

And if the Fund doesn't have them in the Fund office, perhaps their agents did, their counsel, former trustees. We need to see these documents. We have a right to these documents.

So we think we've been highly prejudiced by this failure to get these documents. And we think that these

Page 759

ARBITRATION - VOLUME IV

documents were clearly responsive to our production requests that we made back in the summer.

So at this juncture, we think we cannot eliminate the prejudice, but for the reasons that I discussed and the importance of these documents, we should not be required to just press ahead.

So, instead, as a consequence of all this, The Times would like to and hereby does make the following motion to hopefully at least mitigate the prejudice.

So, first, we would move for an order requiring the Fund, Mr. Arbitrator, to produce all of the exhibits to the minutes that we have received, the agenda memos. I made mention that there were apparently written agenda memos that were provided at each of the trustee minutes. We'd like all of the agenda memos that were prepared for each trustee meeting and all other documents referred to in the minutes.

ARBITRATION - VOLUME IV

And we'd like the order to require the Fund to inquire of all of its agents for minutes relating to special meetings that we have not yet received or other meetings involving trustees where minutes or notes were kept.

Second, following receipt of these documents -- and we don't think it would take that long to pull them together, 10 days, 14 days, tops -- we'd like an order allowing us a three- to four-week period to depose or redepose witnesses. We don't want to have to confront these witnesses with documents at a hearing without have a sense of what would be said about them.

To be sure, the depositions will be limited to questions regarding trustee minutes and trustee minutes only and the exhibits and the other documents that we would be provided.

And, third, following sort of the close of this mini additional deposition period, we would like the opportunity to

ARBITRATION - VOLUME IV

then identify the witnesses we'd like to put back on the stand, like a Terry Hayes or Rosana Egan or additional witnesses, potentially trustees, other trustees.

And then we'd schedule additional hearing days, and that would also include Ms. Albergo, presumably in May or perhaps June after this short period to take depositions.

And, fourth and finally, we'd like the order to require the Fund to pay The Times' costs and fees for this additional discovery and hearing testimony.

And in that final regard and as to this last request, we would like the opportunity to brief the issues so that we can provide to you, Mr. Arbitrator, what we think would be useful precedent to demonstrate that under that fact scenario we have here there is clear support and a good foundation for the imposition on the Fund of causing them to pay The Times' costs and fees for this

ARBITRATION - VOLUME IV

additional discovery.

Now, I recognize that there's some irony in this because this request would extend the proceedings further. And as you know, we at the time said historically, in trying to move in the other direction, to wrap this up. That irony hasn't been lost on me or my client.

And to be sure with this delay The Times is going to have to continue to make the ongoing withdrawal liability payments, and that's prejudicial.

But we think in light of the wrongful practices here and in order to have a full and complete record and to mitigate our prejudice that has and would continue to result from a failure to have this opportunity to properly prepare for and use these responsive documents, this is the fairest way to proceed. And that we should not have to pay for these extra efforts caused by the very, very late arrival of what our relevant and helpful

ARBITRATION - VOLUME IV

document and documents that should have been produced are.

ARBITRATOR IRVINGS: Just so I understand before you respond.

What is your request regarding today?

MR. MILLER: So obviously we thought about that. So we have three witnesses scheduled for today. The order was Mr. Urbank and then Dr. Kra, my cross of Dr. Kra, and then Mr. Lewis from Weiser. Let's take the easy case.

I don't think there's any reason we should hold up the cross-examination of Dr. Kra, to be sure. And as I said, there's some meeting minutes that is supportive of our theory of the Segal blend. I would like to reserve the opportunity, although I don't think we'll use it, to have him come back, but I think we should proceed.

It makes sense to proceed with Dr. Kra. He's really independent of this

ARBITRATION - VOLUME IV

additional request.

With Mr. Lewis, our view was that assuming he's here and we're all here, while we would reserve the right to recall him, we're ready to proceed to examine him. We'll put aside an examination of him respecting a trustee minutes of meetings obviously he was at until we've got the whole package of relevant documents so we don't do it piecemeal. But we think it makes sense to nonetheless proceed with him.

Mr. Urbank was the toughest of the three as it relates to what we're requesting. And we think on bounds that, notwithstanding his being here, that so many of these documents are related to his testimony. Indeed, you may recall, Mr. Arbitrator, he's the one who often takes the minutes of the meetings and does the initial draft of minutes.

So I think as to him, all things being equal, it would be prejudicial to The Times and kind of half-hearted to

ARBITRATION - VOLUME IV

have a cross-examination of him now, knowing that for certainty we'd want to both redepose him on certain documents, so we can prepare in advance what he would have to say as it relates to testimony, and then hearing testimony.

So that's how we align the witnesses.

ARBITRATOR IRVINGS: Okay.

MR. RICHMAN: I'm just going to make some initial comments. Obviously, this is an extraordinary surprise to us.

My first reaction, I think the best analogy here, this is a desperate cry for help from a drowning person and nothing more.

This idea that there is extraordinary evidence in the meeting minutes is ridiculous.

We have had a lot of evidence, both people testifying as well as a plethora of documents, that have talked about contribution rate, the difference between

ARBITRATION - VOLUME IV

contribution rate and contribution base unit.

Ms. Egan, Mr. Urbank both testified about that.

There are lots of other documents already admitted into evidence that talk about consideration rate, and to say that, whoa, all the sudden we have found the Holy Grail is ridiculous.

That's not any new evidence. It's not even evidence at all.

Now, Mr. Miller has given us two examples when he opened his -- I was going to say plea, but -- presentation. He was talking about what appeared to be many more than two examples.

We, obviously, would like the opportunity to know what these examples are and to address them, because other than the two that have been pointed out, we don't know about them.

We think that we produced documents appropriately. It is absolutely the case, given the tumult at the Fund with

ARBITRATION - VOLUME IV

respect to the termination of the in-house folks and the changes of trustees that one can easily see from year to year. And the changes in lawyers, it's been difficult to collect documents.

But we've done everything appropriately with respect to producing documents. We actually offered in our response to The Times' last motion that all of the minutes be put into evidence. And we're happy to go back and ask again for anything that appears to be missing. We do know that there are missing minutes, as you know, that we have wrote to you earlier this week.

With respect to the other requests for relief, I think it's not a surprise given my response or given the request that they are completely and totally out of bounds. We're happy to respond to them in writing if, Mr. Arbitrator, you think that's even necessary. We're certainly hoping that it isn't necessary

ARBITRATION - VOLUME IV

because they're, quite frankly, off the wall.

And -- but we are certainly willing to take all the minutes, put them into evidence. That was our proposal. That's fine.

If The Times has good reason to take other depositions after looking at this -- after pointing to this new evidence, in quotes, you know, that is fine. But contrary to The Times' approach, if we're going to open up a whole discussion about evidence, it's already in evidence. It's not The Times that should be compensated here, it is the Fund.

And so we have ourselves a little bit of a mess here. And my suggestion would be that The Times put it in writing so we can respond to a motion.

I would like the opportunity to, quite frankly, not have to respond and not spend the Fund's resources to respond to a motion that I think is credibly

ARBITRATION - VOLUME IV

unfounded, but if, Mr. Arbitrator, you think that we need to respond, we obviously will respond.

In terms of today's events, you know, without having a written motion and really some real argument about why this is startling new evidence, I do think we should go forward with all three of the witnesses. And, you know, obviously that's not going to be my call, right. And I got that.

I will say that we are told Dr. Kra -- oh, he's here.

MR. MILLER: He's here.

MR. RICHMAN: He is here.

ARBITRATOR IRVINGS: But that was going to be a powerful argument.

MR. RICHMAN: I didn't know what time he was coming.

ARBITRATOR IRVINGS: I understand.

MR. RICHMAN: So he's here, he's got a pretty difficult schedule, let's go ahead and deal with him in

ARBITRATION - VOLUME IV

terms of a cross and recross, if necessary.

Mr. Lewis is waiting to receive a call from us to let him know what the schedule might be. We are happy to have him testify today. And, quite frankly, we think Mr. Urbank ought to testify too, but again that's your call.

MR. MILLER: May I respond?

ARBITRATOR IRVINGS: No.

MR. MILLER: Okay.

ARBITRATOR IRVINGS: Without attributing blame, culpability and the rest, my approach obviously throughout this whole proceeding while handling a plethora of motions is that my role is to get in evidence as much as is relevant, necessary and expeditiously as possible. I consider that my obligation.

I'm concerned about some of the things in the minutes -- again, without attributing culpability or the rest. Clearly, while the issue of the

ARBITRATION - VOLUME IV

difference between contribution rate and CBUs has been well highlighted, what has now been pointed out, at least the examples, would represent things that was discoverable.

And you are entitled to make an assessment as to whether you want to do, A, get certainly the exhibits, the documents you want. I would like a listing of what it is.

MR. MILLER: Yes.

ARBITRATOR IRVINGS: And if there are other points in the minutes that you feel trigger requests for documents, highlight those to me and to Ron.

Clearly Dr. Kra, there's no reason not to take him. Largely, he wasn't part of the meetings.

MR. MILLER: We agree.

ARBITRATOR IRVINGS: Mr. Urbank, I think it's not appropriate to take him until you get the additional stuff, at least. At the very least,

ARBITRATION - VOLUME IV

one of the examples related specifically to his reports and his work and his discussions at the meetings.

The other gentleman, Mr. Lewis, the auditor, do you feel you can --

MR. MILLER: Yes. As I indicated, we can certainly start and we think it would be useful given that everybody is here to have an initial examination of him, but we would reserve the right as a consequence of the documents we have and will be receiving to recall him.

ARBITRATOR IRVINGS: You certainly reserve the right to request to recall him.

MR. MILLER: Right.

MR. RICHMAN: And if he is going to be recalled, and certainly Urbank, it sounds like will be recalled, we think that the freeze ought to melt. The witness freeze ought to melt --

ARBITRATION - VOLUME IV

ARBITRATOR IRVINGS: Meaning?

MR. RICHMAN: Meaning, Mr. Urbank testified, so we haven't talked to him since he's testified here because he's in the middle of his testimony.

ARBITRATOR IRVINGS: Right.

MR. RICHMAN: And so if we are now going to go back and do discovery, and Mr. Urbank may get deposed, that we want the opportunity to talk to him about the new things that he is going to be deposed by, if he is deposed and he is going to testify about, if he's going to testify. And the same for Mr. Lewis.

MR. MILLER: I think Ron's request is fair as it relates to a deposition. And we would like to depose him before we put him back on the stand, because we're trying to sort of replicate where we would have otherwise been if we had these documents.

ARBITRATION - VOLUME IV

And so I do think, first, we do want to depose him as well as put him back on the stand.

And as a consequence of our wanting to depose him, I do think it would be unfair if he were prohibited from being prepped for that deposition.

ARBITRATOR IRVINGS: Okay. Thank you. Great. We'll do that then. You'll be able to speak with Mr. Urbank.

MR. RICHMAN: Okay.

And what about Mr. Lewis?

ARBITRATOR IRVINGS: If he's going to be deposed, yes, you'll be able to speak to him, too.

MR. RICHMAN: Okay.

ARBITRATOR IRVINGS: Okay.

MR. MILLER: So, Mr. Arbitrator, based on what you said, let me make this recommendation.

Perhaps by Monday, if not earlier, we would provide to you and Ron both a

ARBITRATION - VOLUME IV

particularized request as to the additional categories of documents that we want.

We would identify as it relates to the meeting minutes that we do have other instances in which we think that a particular document is relevant.

I think we would probably want to hold off on who we want to depose until Mr. Richman has provided the additional documents. We would then promptly indicate to Ron who we want to depose. And then following those depositions, we would identify who we'd want to put on the stand.

ARBITRATOR IRVINGS: Let me mention this. You mentioned, for example, agenda memos or whatever.

MR. MILLER: Memos.

ARBITRATOR IRVINGS: Is it necessary for you to get the agenda memos for every meeting even where from the minutes there's nothing that --

ARBITRATION - VOLUME IV

MR. MILLER: I think so because the minutes are -- they are not necessarily thorough.

It may well be the case that, for example, an agenda --

ARBITRATOR IRVINGS: It's okay. I'm willing to err on the side of completeness. I don't know what it means in terms of --

MR. RICHMAN: We don't even know what they are.

THE COURT: Okay.

And you can give them an annotated request explaining what they are. Give them like a treasure map.

MR. MILLER: Okay.

MR. RICHMAN: The fact it may appear in the reference to the minutes --

ARBITRATOR IRVINGS: I understand. Let me ask another question, a practical question.

Terry Hayes was a trustee during this entire period?

ARBITRATION - VOLUME IV

MR. MILLER: No. He became a trustee I believe in '07.

MR. RICHMAN: '07, that's pretty close to the --

ARBITRATOR IRVINGS: That's pretty close.

MR. MILLER: Most of the people.

ARBITRATOR IRVINGS: Most of the people.

Does he have, so far as you know, a complete set of minutes and agenda items?

MR. MILLER: We have not reviewed those minutes because they are not --

ARBITRATOR IRVINGS: I guess my first question being, could we ask him does he think he has all --

MR. MILLER: We did ask, and he says he does not believe he has a full set of minutes.

MR. RICHMAN: Well, he testified that he had the minutes that we took him from, he had the

ARBITRATION - VOLUME IV

meeting materials, that he took them home -- not home, to his office, and that he had them in his office and they never left his office.

So, look, we're happy to have him -- without discussing with Mr. Hayes what went on in the trustees meeting, because we think that would be a prohibited transaction -- to have him turn over his -- any set of meeting minutes that he has, meeting minutes and exhibits to the meetings.

ARBITRATOR IRVINGS: Right. Okay.

MR. RICHMAN: That does not include his minutes that were, any notes that were taken, although it didn't sound like he took notes, but we're happy to have him turn over all the minutes and agenda items if those things exist.

MR. MILLER: That sounds fine. To the extent he took those minutes, unless those minutes reflect

ARBITRATION - VOLUME IV

privileged information, why wouldn't we be able to get those minutes? Those notes. Notes.

ARBITRATOR IRVINGS: Those notes.

Let's take it one step at a time. My only concern, to forestall a subsequent problem, I went through a whole process -- and you went through a process of redacting, I went through the process of the appropriate redactions. So you probably don't want to turn over the complete minutes.

MR. RICHMAN: Thank you. My mistake.

ARBITRATOR IRVINGS: All right. Because I don't want to do it again.

So perhaps you can provide him with a list, Mr. Hayes a list, the minutes. He doesn't have to produce all the minutes that we've already produced and have been redacted. But to the extent that he has these agenda memos, exhibits to the -- responding to your list, if

ARBITRATION - VOLUME IV

there are other, for example, minutes of special meetings that you guys can't find and he has, maybe the answer is to copy them, send them to Ron, make his redactions and then you can filter them to me.

MR. RICHMAN: Copy without reviewing.

ARBITRATOR IRVINGS: Yeah. Terry Hayes can copy them.

MR. RICHMAN: Right.

MR. MILLER: The point is it goes to you first, make the call about what might be privileged and give us the nonprivileged, and then we'll decide.

Now, the issue of notes is entirely separate, right. This is an issue the same as any other trustee. If they have notes from the meetings --

MR. RICHMAN: He can produce them but not just give them to them.

ARBITRATOR IRVINGS: Right.

MR. RICHMAN: In other words,

ARBITRATION - VOLUME IV

that there's a difference between them just receiving his notes.

If he has some notes, we're happy to -- he can produce them.

MR. MILLER: Notes should be produced. Not just notes, though, from Mr. Hayes. To the extent other trustees have notes that they took at these meetings, it would be useful and consistent with your overarching objective that the both parties have notes.

ARBITRATOR IRVINGS: So to the extent the notes exist that don't relate to privileged information --

MR. RICHMAN: Well, the answer is, you need to follow the same setup, right? Copy those notes, send them to us.

ARBITRATOR IRVINGS: Right. That's fine.

MR. RICHMAN: And we will redact --

ARBITRATOR IRVINGS: That's

ARBITRATION - VOLUME IV

fine. And then send both sets to me, a complete set and a redacted set.

MR. MILLER: And not just Hayes, but my point was other trustees.

MR. RICHMAN: Happy to do that.

MR. MILLER: And former trustees.

MR. RICHMAN: Former trustees would be interesting.

ARBITRATOR IRVINGS: So you will produce the list of documents you are seeking.

MR. MILLER: Yes.

ARBITRATOR IRVINGS: And we'll go on from there.

MR. MILLER: Very good.

And we will be able to take depositions once we've got those documents and determine who needs to be deposed.

ARBITRATOR IRVINGS: That's fine.

MR. MILLER: That was my

ARBITRATION - VOLUME IV

understanding.

ARBITRATOR IRVINGS: Well, this was a frolicking detour.

You want to call Dr. Kra back?

MR. RICHMAN: Can we break for five minutes?

MR. MILLER: Certainly.

(A brief recess was taken.)

ARBITRATOR IRVINGS: Cross resumed.

He was previously affirmed.

MR. MILLER: So technically this is the beginning of the cross for Dr. Kra.

ETHAN EMANUEL KRA, Ph.D., FSA, having been previously affirmed by Arbitrator Irving, was examined and testified as follows:

CROSS EXAMINATION BY MR. MILLER:

Q Okay, Doctor. Good morning.
A Good morning.
Q Let's talk about briefly your experience as an actuary for multiemployer

ARBITRATION - VOLUME IV

pension funds.

During the time when you were serving as an enrolled actuary for multiemployer funds, do you recall whether they had occasion to assess withdrawal liability?

A I had at least one fund that did withdrawal liability. There may have been others. I just would have to go through the list.

Q And the one fund that you do recall that assessed withdrawal liability during your ten years as an enrolled actuary, what was what fund?

A The UFCW Local 1262 Nonfood -- I'm sorry, no, the Food Pension Fund.

And also we did withdrawal liability on the Nonfood Pension Fund which was through a mass withdrawal.

Q In terms of non-mass withdrawal liabilities, roughly how many calculations would you say that you have performed on behalf of multiemployer pension funds for which you were the enrolled actuary? And by

ARBITRATION - VOLUME IV

"calculations," I mean withdrawal liability calculations.

A I don't recall.

Q Would it be more than five?

A I don't recall.

Q Do you recall what the time frame was during the period in which you did perform calculations of withdrawal liability?

A Thinking through, the UFCW Local 1262 Food Fund had withdrawals, but I believe that the calculations were prepared by one of my colleagues and not by myself.

The Nonfood Fund had a mass withdrawal. We had withdrawal liability assumptions and methods clearly outlined. I don't recall if we had any prior to the mass withdrawal actually withdrawing.

Q So as you sit here today, can you recall any instance in which you calculated a withdrawal liability for a withdrawing employer of a multiemployer pension plan outside of a mass withdrawal?

A I can't recall.

ARBITRATION - VOLUME IV

ARBITRATOR IRVINGS: Sorry. Keep your voice up because of the noise-maker here.

Q Dr. Kra, let's turn to the Segal blend.

Am I correct that you do not agree with the Segal blend approach to valuing unfunded vested benefits for withdrawal liability purposes?

A It is not the method that I would select.

Q So it is not the approach that you would take in calculating unfunded vested benefits for withdrawal liability purposes?

A Correct.

Q Do you believe that the Segal blend approach to valuing unfunded vested benefits for withdrawal liability purposes is a sound approach?

MR. RICHMAN: Objection. I'm not sure what "sound" means.

Is that, does it abide by the law of ASOP principles?

ARBITRATOR IRVINGS: Fair

ARBITRATION - VOLUME IV

enough.

BY MR. MILLER:

Q Dr. Kra, what is your understanding in this context of a sound approach to valuing unfunded vested benefits for withdrawal liability purposes?

MR. RICHMAN: Objection. The same objection.

ARBITRATOR IRVINGS: No. He's asking him to define it.

A "Sound" has many different definitions, and so I would need clarification as to the context you're looking for. Is it sound for ongoing funding? Is it sound for withdrawal liability? Is it sound for financial reporting?

There is no -- I need a better context.

Q Fair enough. And let me build some foundational questions.

When I refer to the Segal blend approach, I'm referring to it in the context of using it for valuing withdrawal liability

ARBITRATION - VOLUME IV

as opposed to ongoing funding. Okay.

In that regard, are you aware of any pension fund that uses the Segal blend approach for ongoing or minimum funding purposes?

A No.

Q So in connection with use of the Segal blend approach respecting valuing unfunded vested benefits for withdrawal liability purposes, do you believe that the Segal blend approach is a sound approach from the standpoint of applicable actuarial principles?

A Under actuarial standards of practice, I believe the Segal blended approach would comport and comply with actuarial standards of practice and with the statute.

Is it the approach I would select? No. Does it comport with the rules? I believe it does.

Q Do you believe it comports with the rules in all events or situationally depending on the particular pension fund

ARBITRATION - VOLUME IV

involved?

A I don't give blanket statements covering everything possible in the world. I mean, there are always outlier, crazy situations.

As an actuary before opining on anything, I look at the situation, evaluate the facts and determine whether something is appropriate.

There are differences as to whether all benefits are due to be paid within six months so no benefits would be paid for the next 30 years and it's a delivered liability many years out. There are so many different scenarios that are possible, I just can't give a for-all answer.

Q Let's talk about PBGC interest rates. Would you characterize the interest rates that are published by the PBGC as a type of risk-free or near risk-free rate?

A The PBGC rates are designed to be relatively market-based risk-free rates. I'm not going to say they're one hundred percent risk free because there are

ARBITRATION - VOLUME IV

differences between Treasuries, corporate bonds, triple As, double As, default risk, but the PBGC rates I believe are designed to be a proxy for a relatively risk-free discounting system or structure.

Q So for the purposes of this examination and to move it along, would it be fair to say that the PBGC rates are a near risk-free rate?

A A near risk-free rate. I'm not going to say they're the only possible choice, but they are one of a number of possible near risk-free rates that an actuary can select.

Q What is your understanding of how PBGC rates are derived?

A My understanding is -- and I would have to look at their materials because their methodologies may have changed over the years. But at certain points in time they have surveyed insurance companies and obtained annuity quotes, or they have used their contacts in the pension industry to determine what annuity quotes are or annuity

ARBITRATION - VOLUME IV

rates are and, based on those quotes or rates and certain mortality tables, develop what the interest rate would be or, alternatively, maybe even given the interest rate directly.

I would have to look at their published materials because their methodology may have evolved over time. So if you have something specific I could look at, I'd be glad to comment on it.

Q Am I correct that insurance companies develop their annuity quotes in part based on expected returns of portfolios of high-grade corporate bonds?

A They generally will look at the corporate bond yield curve, the bonds in the marketplace, the cash flows that are expected under the annuity stream of pension stream and try to determine a matching portfolio to immunize themselves against the changes in interest rates over time.

They may have to adjust for things like calls and put options in bonds or defaults, things like that.

ARBITRATION - VOLUME IV

Q Would it, therefore, be fair to say that PBGC rates approximate the expected return on a portfolio of high-grade corporate bonds?

A They are close to. I'm not going to say they match, but they are approximately in the range of what a high-grade bond portfolio of a matching cash flow would yield.

Q And do you know what percentage of the portfolio of assets owned by the Pension Fund in this case is invested in high-grade corporate bonds?

A As of the withdrawal date of May 2009, I believe that 47 percent of the portfolio was invested in fixed income securities.

Q And fixed income securities, of course, could include high-grade corporate bonds but they could also include other bonds that are not of a high-grade ranking, correct?

A Generally, they would include high-grade bonds. They might include other

ARBITRATION - VOLUME IV

bonds but they may also include money market instruments that would have lower expected returns.

Q And I take it that you don't know what the suballocations were of the Pension Fund in this case as it relates to their fixed income bond portfolio?

A I don't have specifics on the grades of bonds of event.

If we look at the 5500 filing, it probably would have noted in it the duration of the bond portfolio. And, generally, most of these funds would have a duration that is shorter than the duration of the liabilities and thus would have a lower return than what would be needed to immunize the cash flows of the pension obligations.

Q But that's generally speculative on your part? You haven't done the analysis.

A We have the 5500s here; we could easily look at it.

Q But you haven't done that analysis?

A I haven't done that analysis.

Q Does the Pension Fund in this case

ARBITRATION - VOLUME IV

primarily own high-grade corporate bonds?

A I have not analyzed the specific bond holdings of this Fund.

Q Do you know whether the Pension Fund in this case primarily owns risk-free or near risk-free assets?

A I have not analyzed the specific holdings other than to note that this Fund was 47 percent of fixed income securities as of the withdrawal date.

Q Do you know if the Pension Fund in this case plans to shift or alter its investment allocation and increase its percentage of risk-free or near risk-free assets in the future?

A I have not spoken with any of the trustees or anyone from the investment advisers of the Fund and I have no knowledge of their long-term plans.

Q Are you familiar with the term "actuarial bias"?

A I've heard that term.

Q What is your understanding of the term "actuarial bias"?

ARBITRATION - VOLUME IV

A That, let's say, you had a bond portfolio that was going to earn 5 percent over a period of the payout stream of these benefits but you were worried about adverse -- let's say you were, if you used, let's say, 4 percent because you were afraid that people might outlive the mortality tables and you wanted conservatism, or you use 6 percent because you said, well, we're rolling the dice and we might do better.

So that would be a bias, in my view, as to which way you are valuing the liabilities, higher or lower.

Q So to continue with your example, if a bond portfolio was otherwise objectively projected to earn 5 percent, and the actuary estimated the return to be either less than 5 or more than 5 because of other circumstances, in that case the actuary would be engaging in actuarial bias, correct?

A Not necessarily because there may be justifications for the difference, such as if the actuary were using the Neanderthal

Page 796

ARBITRATION - VOLUME IV

Mortality Table where everybody is dying quickly, then you'll justify using a 2 percent interest rate to offset the bias in the mortality table; or if, on the other hand, they were using the Superman Mortality Table, then it would justify using a 7 percent interest rate.

Q But if one assumes all things are otherwise equal in terms of other assumptions, if a bond portfolio is otherwise projected to earn 5 percent and an actuary values it at less than or more, the actuary would be engaging in a form of bias.

A No. I disagree with the statement as phrased because you are saying the portfolio.

I would say the bias initiates from looking at the liability stream and looking at the bonds that would match that liability stream, not the actual bonds in the portfolio.

So I don't look at the bonds that are actually held by the fund. I look at the bonds that would match the liability

Page 797

ARBITRATION - VOLUME IV

stream.

Q In the example you gave, that's a durational look, correct?

A It's looking at -- well, duration is an approximation because yield curves could be concave or convex and you could have the same duration -- two portfolios could have the same duration yet a different return.

Because, let's say, you had a bond portfolio that had ten-year bonds and one-year bonds, and you had another bond portfolio with all five-and-a-half-year bonds, they might both have -- or duration, ten duration ones, the others are all duration five and a half. They might have the same average duration, yet they would have different returns because of the convexity and concavity of the yield curve.

MR. MILLER: I'm going to avoid following up on that, and instead I'm going to ask a more simple question.

Q If an actuary were to engage in bias, that would necessarily need to -- that

Page 798

ARBITRATION - VOLUME IV

bias would necessarily need to be in connection with the actuary's making a future prediction of an event, correct?

A Well, the bias would represent either a conservatism or a lack of conservatism in the projection.

Very often you'll see an insurance company for life insurance will have a bias assuming people die sooner just to make sure that the life insurance policies have enough in case a plane came along.

Q But my question was really more simple than that: That bias, when undertaken by an actuary, necessarily needs to be in connection with the actuary's prediction or projection of a future event?

A Or it could be a bias in the measurement of the current situation.

You have assets that may not have readily tradeable market values, illiquid assets, partnerships. Then there could be a bias in the valuation of those assets, which is not a future event, it's a current event.

Q I see.

Page 799

ARBITRATION - VOLUME IV

I would like you now to assume that a multiemployer pension plan is invested primarily in risk-based assets.

And based on that assumption, do you believe that a risk-free rate or near risk-free rate would be an unbiased prediction of the anticipated rate of return for such a pension plan?

A The risk-free or near risk-free rate would represent a risk adjusted projection of the return on that portfolio.

Q But that's not quite the question I asked.

I asked you the question of, as it relates to actuarial bias. If you assume that a pension plan primarily owns risk-based assets, do you believe that use of the risk-free rate is and would be an unbiased prediction of the anticipated rate of return for that pool of pension plans?

A I believe that it would be an unbiased valuation of the liabilities, which is what you use that return for.

Q I want you to focus a little bit

ARBITRATION - VOLUME IV

more on the particulars of the question.
Assume you've got a pension plan that primarily owns risk-based assets and an actuary is predicting the anticipated rate of return for that pension plan pool of assets.
If that pension plan pool of assets is primarily invested in risk-based investments, is the use of a risk-free rate or near risk-free rate an unbiased prediction of the anticipated rate of return?
A Anticipated rate of return will be a relatively bell-shaped curve.
And if you are evaluating the 50th percentile, the 50th percentile will be higher than the risk-free rate.
However, if you are looking at it in terms of value to the holder, valuing it at the risk-free rate would reduce it to the market price.
Q Now I want to switch for a moment from the concept of the actuary bias to the concept of best estimates, because in your

ARBITRATION - VOLUME IV

direct testimony you were questioned by Mr. Richman about the concept of best estimate and best estimate range.
Do you remember that testimony?
A I believe -- I don't remember the details of my testimony, but I would recognize that those concepts could have been asked. I have not seen the transcript from a few weeks ago.
Q Okay.
Assume, again, that a multiemployer pension plan is invested primarily in risk-based assets.
Do you believe that use of a risk-free rate or near risk-free rate would represent the actuary's best estimate of the anticipated rate of return for this pension plan's asset pool?
A The question is if you are looking at the returns on the asset pool or the ability of the asset pool to cover the liabilities of a liability stream --
Q And let me stop you --
A -- and the ASOPs make it very clear

ARBITRATION - VOLUME IV

that in picking the best estimate or the best estimate range for a particular situation, you have to look at the purpose of the measure that is explicit in the ASOP.
So absent the purpose of the measure for which the answer may be different depending on purpose of measure, I can't answer the question.
Q Okay. So I'm going to unpack that answer a little bit and ask you a particular question as it relates to a particular portion of it.
If the actuary's task is in fact to look at and to predict the anticipated returns on that asset pool and that is the task, do you believe that the risk-free rate or near risk-free rate would represent the best estimate of the anticipated rate of return for that asset pool, if the asset pool was invested primarily in risk-based --
A The actuary would end up with a spectrum of returns with probabilities under ASOP 27. The best estimate is a range between generally the 25th and 75th

ARBITRATION - VOLUME IV

percentiles as the ASOP was constituted at the time of this particular measure.
And so if you were looking at solely expected return on assets for purposes of projecting the assets, you would have a range of the 25th to 75th percentiles on the return of those assets. And that is what the ASOP says.
Q I know but that's not the question I wanted you to answer.
I wanted you to answer a simple question.
If you have a -- if a pension plan has a pool of assets and they are primarily invested in equities, would the risk-free or near risk-free rate represent the best estimate of the anticipated future return for that pool of assets?
A A future return on a future pool of assets would be a range of returns depending on -- it is a probability of different returns. You could calculate the 50th percentile, the mean or the median that will differ from the risk-free rate.

ARBITRATION - VOLUME IV

However, the best estimate is a range which covers a range of returns, and the risk-free rate may very well be within that range.

Q Or the mean or median rate of return would be distinct from the risk-free rate or near risk-free rate?

A That mean or median return would equal the risk-free rate plus a risk premium depending on the riskiness of the portfolio.

The risk premium that is earned over time by those who bear the risk.

Q So that's another way of saying yes to my question?

A I'm not saying it's yes. You are characterizing it as yes. I'm being very explicit --

MR. MILLER: I withdraw it.

Q Do you believe that the risk-free rate should be used to valuate a pension plan's unfunded vested benefits for withdrawal liability purposes --

A Yes.

Q Let me finish the question.

ARBITRATION - VOLUME IV

A I heard a pause, so I answered the question when I heard the pause. I thought there was a question mark.

Q I'll try to phrase the question and state the question without taking a pause or a breath.

Do you believe that the risk-free rate should be used to value a pension plan's unfunded vested benefits for withdrawal liability purposes regardless of the actual assets that the pension fund owns in its portfolio?

A Yes.

Q Would the use of the risk-free or near risk-free discount rate in such a case reflect the anticipated investment returns on the plan's actual portfolio of assets?

A It would represent a risk adjusted expected return on the plan's assets.

Q But it would not represent the expected mean or median return on that plan's portfolio of actual assets, correct?

A It would not represent the mean or median.

ARBITRATION - VOLUME IV

Q Right.

Would the use of the risk-free or near risk-free discount rate in such a case reflect the anticipated experience of that plan?

A It would represent the risk adjusted anticipated experience of the plan.

Q And what do you mean by "risk adjusted anticipated experience"?

A Let's say I own a portfolio, a hundred percent of the S&P 500. And hypothetically let's assume -- and I'm not giving investment advice -- that the S&P 500 is expected to return 9 percent compounded annually over the next 20 years.

And let's furthermore assume that a risk-free portfolio for that same 20 years horizon would earn 5 percent.

If I wanted to guarantee that, even though I'm expecting to earn 9, that I would never get less than 5 over that 20-year period, essentially I would have to give up the 4 percent and all of the upside.

In other words, I would have to pay

ARBITRATION - VOLUME IV

the counterparty that's guaranteeing me the 5 percent floor everything that I earn up above 5, the 5 to 9 and everything above that.

Q And that related to the Bader swap that you previously testified to?

A The Bader swap is basic finance.

Q So let me ask you this question: Would you say that the risk-free or near risk-free rate when used to calculate withdrawal liability reflects a best estimate of anticipated experience under every multiemployer plan?

A As I said, I can't say every because there's always some outlier situation, so I don't want to give an unequivocal for all because then maybe we can come up with some weird situation.

But in general, my view is that the risk-free rate based on the liability stream of the payments under the fund represents the best risk adjusted estimate of returns under the plan and experience under the plan.

ARBITRATION - VOLUME IV

Q Putting outliers aside, of any multiemployer plan, correct?
A Of any multiemployer plan.
Q And I take it that's because you believe it's appropriate to avoid a transfer of risk from the withdrawing employer to other contributing employers to, in these circumstances, hypothesize for withdrawal liability calculation purposes a different pool of assets that is comprised of risk-free or near risk-free assets, correct?
A I don't follow the question. There are too many moving parts in that question, so let's break it up.
Q Okay.
So am I right that under your theory, it's appropriate to use a risk-free rate or near risk-free rate to calculate withdrawal liability because there is a prospect -- depending on the rate that's used -- of transferring risk from withdrawing employers to other contributing employers, correct?
A If you use a rate any higher than

ARBITRATION - VOLUME IV

the risk-free rate, the withdrawing employer is transferring risk which has value, negative value, so to speak, to the ongoing employers, and essentially the ongoing employers are subsidizing the withdrawing employer to the extent of the risk transfer.
Q That's my understanding of your opinion.
And so in order to avoid this transfer of risk from the withdrawing employer to the other contributing employers, under your approach, you essentially hypothesize for withdrawal liability calculation purposes a different pool of assets comprised of risk-free or near risk-free assets to determine the discount rate as opposed to the actual plan portfolio, whatever that might be.
A What I would do is I would not look at the actual portfolio. I would look at the liability stream. And "a liability is a liability is a liability, is a liability, is a liability to quote that poet about roses (ph.), and say that the liability is

ARBITRATION - VOLUME IV

independent of the opposing assets.
A liability is what it is and the assets are what they are. And one is used to help pay the other, but would almost be to say that if the bank I take my mortgage from, if I borrow money as a home equity loan and I go and invest it in high-risk equities, the bank should mark down the loan as being a lower liability because there's a higher expected return on the cash flow payments.
Q So your approach in effect is based on the anticipated experience of the plan in connection with not the plan's actual invested assets, but a different pool of assets, risk-free assets. Isn't that right?
A It's valuing the liabilities based on a portfolio of bonds that would match the liability stream of the benefit payments.
Q Regardless of the actual assets that the particular pension plan may be invested in, correct?
A Correct.
Q Let's turn back to the topic of

ARBITRATION - VOLUME IV

best estimate and best estimate ranges.
Dr. Kra, I think you testified in your direct examination about a best estimate discount rate for valuing liabilities needing to fall within a best estimate range in order to be consistent with actuarial practice.
Do you remember that?
A Yes.
Q And is it your view that under standard actuarial practice an actuarial best estimate, for example, future investment returns of a portfolio, necessarily refers to an estimated range?
A The actuarial standard of practice that was in effect in May of 2009 described it as a range in which it was more like -- the narrowest range that it was more likely than not. And the actuarial practice at that time was a 50 percent spread in the probability distribution generally viewed as the 25th to 75th percentiles.
Q But, of course, in picking a discount rate for valuing liabilities, one

ARBITRATION - VOLUME IV

has to and as part of that calculation come up with a single number or a single rate for that purpose, right?

A Yes.

Q And is it your testimony that as long as the rate that is chosen falls within the best estimate range, as you believe that shall be defined, such a number would represent the best estimate?

A As the actuarial standard of practice. It's not what I believe, it's what the ASOP said. The ASOP said that it was the narrowest range more likely than not, which the practice at that time was 25th to 75th percentile. It's not my view, it's the standard of practice as applied by actuaries in the United States in 2009.

Q But just to clarify that, this is your view of what general actuarial practice was at the time?

A That's my understanding of it.

I was one of the co-authors of the implementation guide published by the

ARBITRATION - VOLUME IV

American Academy of Actuaries on the very issue.

Q Let me ask you this: How does an actuary go about choosing, in your judgment, particularly during the relevant time here in which this withdrawal liability calculation had to be made, a single number within the best estimate range in order to actually make the liability present value calculation?

A There are a number of factors.

Number one, you have to look at the purpose as ASOP 27 states, you must look at the purpose of the measure. ASOP 27 says there are a number of different approaches that can be taken. ASOP 27 gives a cash flow matching approach which comes up with a near risk-free rate. The bond approach as one approach. It also gives a building-block approach as another alternative approach.

There are a number of approaches that acknowledges that there are multiple approaches that actuaries can take based on

ARBITRATION - VOLUME IV

their best judgment, and it lists a few of them and specifies that the actuary must look at the purpose of the measure in deciding how to do it.

Q It was my understanding based on your earlier testimony that those approaches that you've identified, the building-block approach and the cash flow approach, those were approaches to come up with the range.

I asked you a different question which is how does one go about picking the number within the best estimate range?

A Can we look at the ASOP because I don't believe that's what I -- I didn't say that's how you pick the range. I believe that's also how -- it was helping in getting the number. That's another way of getting the number that many actuaries use the cash flow matching to come up with their number.

Q Got it.

And so it's your judgment, just to clarify the record, that use of the building-block approach or use of the cash flow method approach would be approaches

ARBITRATION - VOLUME IV

that are designed not merely to get you to a range, but to get you to a particular rate within a best estimate range?

A I believe that those approaches were used by many actuaries to get a particular rate.

The range would be using some type of stochastic model which would give a probability distribution which would help set the outer bounds for the range; whereas, the cash flow would give you a particular number within a range.

Q In your expert report and I believe in your direct testimony consistent with your expert report, you characterized 3.5 percent to 7 percent as a reasonable range of discount rates for the valuation of unfunded vested benefits in connection with this case for withdrawal liability purposes; is that correct?

A I think we should look at the report. I believe I identified that as the range of interest rates or bond rates that could have been selected at that time

ARBITRATION - VOLUME IV

because of different benchmarks that could have been observed.

And I'd have to look at the wording again in my report.

Q No. I think you properly characterized your report. And let me expand on that a little bit.

Am I right that your opinion both in your report and in your testimony was that at the time the withdrawal liability calculation in this case had to be made, the range for risk-free to near risk-free rates went from as low as 3.5 to 7 percent?

A I believe that's what I said.

Q And therefore, I assume, you would agree and it is your opinion that any number within that range of 3.5 percent to 7 percent would have been a reasonable discount rate that the actuary could have used to compute the withdrawal liability in this case, right?

A How I would rephrase it is that I would not challenge anything in that range as being unreasonable because I think there

ARBITRATION - VOLUME IV

would be good defense.

Q So any number within that range would not be unreasonable?

A I would have difficulty challenging anything in that range as being unreasonable.

Q Seven percent would be a discount rate that is beyond reasonable challenge, in your judgment?

A What I was saying is that if the actuary picked anything in that range, I would have difficulty challenging. It may not be the one I would have picked within that range, but I would have difficulty challenging it as being unreasonable.

Q Using actuarial rules of thumb or other accepted mathematical methods to estimate, can you estimate what the monetary difference is for The Times' withdrawal liability between using a 7 percent discount rate versus a 3.5 percent discount rate to value the liability?

A Without doing the calculation, I would have to get pencil and paper, look at

ARBITRATION - VOLUME IV

the documents, and could I come up with an estimate? Yes. Have I done so? No. Could I give an estimate off the cuff, no.

Q Let me see just for a moment if I could probe that a little bit more.

You are familiar with Darren French's expert report in this case, correct?

A I've read it but I have not looked at it in over a month.

Q Let me see if I can refresh your recollection.

Do you recall that Mr. French essentially came up with an effective discount rate for the Segal blend as applied in this case and that effective rate was roughly 6.5 percent?

A If I recall his testimony at deposition, he had a range and I don't recall if it was 6 to 6 and a quarter, 6 and a quarter to 6 and a half, or 6, 6 and a half, I don't recall, but it was within that ballpark.

Q Here's what I'm getting at. In his

ARBITRATION - VOLUME IV

expert report, he did make a calculation of the difference in The Times' withdrawal liability between using a 7.5 percent rate and roughly this 6.5, maybe a little bit lower rate.

Do you remember that?

A I believe I saw that, yes.

Q And do you remember that his calculation of the difference between an application of the 7.5 discount rate and this roughly 6.5 discount rate was approximately and at least I think 6.5 million.

Do you remember that?

A I'd have to see the report but that doesn't surprise me but I don't remember the number.

Q But it doesn't sound unreasonable to you?

A No.

Q In that regard, if $6.5 million is at least a reasonable approximation of the monetary difference in liability between using 7.5 and approximately 6.5, isn't it

ARBITRATION - VOLUME IV

the case from the standpoint of rule of thumb that the monetary difference for The Times between using 7 percent and 3.5 percent is likely be at least $12 million?

A Yes. Remember that when you are looking at a difference of withdrawal liability, you are looking at leveraged numbers.

So, for example, if the assets of a fund were a hundred million and the change in the discount rate moved the liability from being 101 million to being 105 million, a 4 percent difference, it would be a quintupling of a withdrawal liability.

So when you have leveraging because of the assets, you get a very disproportionate effect on withdrawal liability in the calculation.

So a liability of 105 million versus a liability of 101 million is a 4 percent differential. Yet the difference in withdrawal liability would be 5 million versus 1 million, a 5-to-1 ratio.

ARBITRATION - VOLUME IV

So looking at the difference in the withdrawal liability or ratio is not really a valid measure because of this leveraging effect.

Q Let's move to a different subject, the implications of the actuary in this Fund using a 7.5 percent investment return assumption.

Doctor, I want you to assume for purposes of these questions that an actuary's best estimate is that a Pension Fund's actual assets will return on average 7.5 percent annually.

If the actuary nonetheless discounts the unfunded vested benefits for withdrawal liability purposes using the lower rate and the 7.5 percent best estimate return is in fact realized, isn't it true that the withdrawing employer will have overfunded its allocable share of the benefits?

A If the Fund was invested within an expected return of 7 and a half percent and there were no risks involved and the Fund

ARBITRATION - VOLUME IV

earned 7 and a half percent, and you valued the liabilities at 6, the withdrawing employer would have paid extra.

On the other hand, if that return came because the risk was borne and it was just serendipitously -- or however the word is -- was achieved, then the ongoing employers bore risk, they took risk, they won the bet.

Q I didn't ask about who was bearing this.

I asked essentially a fairly simple math question.

If the best estimate of future expected returns is 7.5 percent annually and that 7.5 percent best estimate is realized, and the actuary nonetheless discounts unfunded vested benefits for withdrawal purposes using the lower rate, it will be true that the withdrawing employer would have overfunded its allocable share of its benefits; yes or no?

A No. It will have funded its allocable. The ongoing employers then went

ARBITRATION - VOLUME IV

to Atlantic City and gambled with the money and won the bet.

So it's that they took risk with the money they received, they won the bet.

Had they lost the bet, they would have made it up.

So they did not overfund. They paid the right number, the withdrawing employer. It's just that the ongoing employers took risk with that money and won the bet.

Q However, if you simply focused on actual results over time and then looked back, isn't it true that in retrospect if the Fund returned 7.5 and you determined the liabilities and thus the withdrawal liability payments at less than 7.5, the employer in retrospect, the withdrawing employer in retrospect will be paying more than its allocable share of the benefits?

A The withdrawing employer will have paid more than would have been necessary to cover those benefits given the actual return which could have come from even buying the

ARBITRATION - VOLUME IV

lottery ticket. So if they bought a lottery ticket and that's how they made their 7 and a half percent, should that have been anticipated when the withdrawal liability payment was determined.

ARBITRATOR IRVINGS: You've stated your respective positions on this question. Let's move on.

MR. MILLER: Okay.

BY MR. MILLER:

Q We've been talking about investment risk in connection with multiemployer pension plans.

If a pension plan's trustees want less investment risk for their portfolio, they're free to change their investment allocation and derisk, correct?

A Trustees have the ability to change investment strategy, to derisk, to de-fees (ph.). There are lots of different things that trustees do.

Q Including, if they wanted, changing their investment allocation to reduce their risk in the portfolio?

ARBITRATION - VOLUME IV

A They have that ability.

Q And if pension trustees wanting less investment risk in fact do derisk and change their investment allocations, that would certainly affect their discount rate for funding purposes, correct?

A Multiemployer plans generally look at the investment -- actuaries from multiemployer pension plans often will look at the investment mix to determine the discount rate that they use for funding purposes.

And if they -- to the extent that a portfolio has a greater portion of fixed income securities, many actuaries will lower the discount rate and increase the funding requirements. I'm not going to say all actuaries do that but many actuaries do that.

Q And, in fact, the typical practice is for funding purposes to use as the discount rate for valuing liabilities the investment return assumption. And if the investment return assumption is lowered

ARBITRATION - VOLUME IV

because the investment allocations have been changed to derisk, then in general, multiemployer pension fund actuaries will change the discount rate?

A Many of them will change the discount rate.

Q But, to your knowledge, the Pension Fund here has not changed their investment allocations either at the time or since the withdrawal liability assessment?

A I have not seen anything on what they've done to their investment portfolio in recent years.

Q If a pension plan's trustees wanted to avoid bearing any risk that the withdrawing employer would underfund its share of unfunded vested benefits, the trustees could segregate the withdrawal liability payments and invest them in risk-free assets, correct?

A They could look at the liabilities for the employees of the withdrawing employer, take the assets, a lockable share of the assets that they currently have that

ARBITRATION - VOLUME IV

are lockable to those employees, and put them in -- give them to a particular investment manager. And they could take all the withdrawal liability payments and give it to a particular investment manager and have that investment manager invest matching the liability stream of those employees. That is something they had the ability to do.

Q And, again, you don't know one way or the other whether the Pension Fund here has done it?

A I have not seen anything but I could not say they have or have not. I have not seen anything that says they have or haven't.

Q I think that in your direct testimony you explained that if a multiemployer pension plan's assets turn out to expect a 7.5 percent investment return but do not achieve that 7.5 percent investment return, in the context of a withdrawal liability, the plan cannot then ex post facto go back to a withdrawing

ARBITRATION - VOLUME IV

employer and seek more money, correct?
A I believe so, yes.
Q But isn't it also true that if the pension plan's assets turn out to return more than 7.5 percent, the withdrawing employer does not get a partial refund of its withdrawal liability, correct?
A Correct.
Q I think we mentioned earlier in this examination and during the course of your direct testimony you discussed something called a Bader swap.
Do you remember that?
A I don't remember how I discussed it at deposition or at arbitration, but I discussed Bader swaps.
Q And am I right to very briefly summarize it that it's essentially a theory of demonstrating the relationship between risk premium and the risk of return below the risk-free rate, right?
A Basically, the Bader swap demonstrates that if you had a risk-free rate and you took any other portfolio and

ARBITRATION - VOLUME IV

you wanted to ensure that you would not earn less than the risk-free rate on that portfolio, that you would have to give up one hundred percent of the upside above the risk-free rate.
Q And that principle is called the Bader swap because it was developed by a then-actuary named Lawrence Bader?
A It was developed by Larry Bader based on his experience working for nine years at Salomon Brothers and observing Wall Street and derivatives and all the functions, and he actually showed how you could literally demonstrate it in the marketplace.
Q And I gather that it is your view that applying that principle here, the idea is that from an ex-ante perspective using the risk-free rate to value liabilities reflects their market value, because if you wanted to avoid any risk of underfunding liabilities, the risk-free rate is the most you'd be able to count on, correct?
A That's correct.

ARBITRATION - VOLUME IV

Q So, thus, rather than making a prediction for future plan experience, application of the risk-free rate to value unfunded vested benefits for withdrawal liability purposes is effectively valuing them based on their ex-ante market value, right?
MR. RICHMAN: Objection. Can you go back and tell us experience -- future plan experience about what?
MR. MILLER: Let me phrase the question again and see if the expert can answer. If the expert feels he can answer it, I think that's fine.
MR. RICHMAN: Well, I don't.
ARBITRATOR IRVINGS: Let's see if we understand the question.
Go ahead.
BY MR. MILLER:
Q Applying the principles developed by Larry Bader in the context of withdrawal liability, am I right that rather than making a prediction about the future pension plan experience of its assets, application

ARBITRATION - VOLUME IV

of the risk-free rate to value the unfunded vested benefits for withdrawal liability effectively values them based on their ex-ante market value?
A It values them using ex-ante market value, and that determines the expected return on the fund if it were to be so invested and represents what the liabilities could be settled for. And it is a market valuation of a future stream of benefits and what matching investments were produced.
Q And, in fact, under your approach, you don't have to make any predictions about future investment returns about the pension plan's actual assets, correct?
A We look at the what the future pension plan's assets would produce if they were in a matching bond portfolio.
Q And not looking at the future investment returns for the plan's assets as actually invested, correct?
A Does not look at that.
Q Thank you.
And, in fact, under your approach,

ARBITRATION - VOLUME IV

you don't make any predictions about the anticipated experience under the plan of its actual assets, correct?

A Except to the extent that at the time of this withdrawal, subject to ASOP 27 one must be in the best estimate range, we generally would look also at the distribution of returns on the actual portfolio to determine the 25th and 75th percentiles. And that might put bookmarks on the discount rate.

MR. MILLER: I need the list of the Objected Exhibits because I'm going to introduce a heretofore Objected Exhibit.

BY MR. MILLER:

Q Doctor, I'm going to hand you a list of Objected Exhibits, an Exhibit 3 from that list. It's a report of an actuarial task force.

A I'm not going to look at it until the lawyer says I can look at it.

MR. RICHMAN: Who objected to this?

ARBITRATION - VOLUME IV

MR. MILLER: You objected to it, just to clarify the record.

MR. RICHMAN: I don't know if you have a copy of it.

MR. MILLER: I'm sorry. It's 3 in the list of Objected Exhibits. It's a report of an actuarial task force. That's part of the legislative history of the multiemployer pension plan.

MR. RICHMAN: And I think it's out of bounds here. It's 1979, November 1979. And it is before the law was actually passed. It's legislative history which is not open for forming an opinion of this actuary.

I don't understand the use of this. Maybe you should tell us what the use of this is.

MR. MILLER: Fair. This is legislative history. It was submitted -- this report was submitted to Congress in its

ARBITRATION - VOLUME IV

deliberation of the Multiemployer Pension Plan Amendments Act of 1980.

And it is legislative history in which this actuarial group provided its opinion on the section of ERISA that relates to the actuarial assumptions that should be used to calculate withdrawal liability.

And, indeed, our argument as it relates to the Segal blend is that the Segal blend is essentially inappropriate as a matter of law because interpreting that provision, Section 4213, of ERISA that talks about the actuarial assumptions that have to be applied {inaudible-overlapping voices} calculation issue, you shouldn't use the Segal blend.

So this is -- we want this in the record for two purposes: First, it's legislative history, so it's not even part of the factual record. The Arbitrator can always take into account legislative history in connection with

ARBITRATION - VOLUME IV

construing a particular statutory provision that is, indeed, at issue in the case.

And, second, in connection with its use for this expert witness, I'd like to confirm whether this expert agrees with the opinions that were advocated by this group and whether those opinions, if he knows, made their way into the law.

MR. RICHMAN: Well, we heard two key words there, "law" and "law."

And what this is is an argument that they can make in their brief at the end of the hearings.

It is they are attempting to use it to interpret the law. And also there's argument pro and con with respect to the use of the legislative history and what these folks think.

Just as a note wasn't produced, I don't know whether the witness ever saw that.

And I know that The Times has been very excited about things that haven't

ARBITRATION - VOLUME IV

been produced, but this belongs in a brief. It doesn't belong with respect to questioning the opinion of this actuary.

Now, what The Times' counsel can do is create a question based on materials, and based on this material, he can ask the question about do you believe X. And then he can argue the legislative history in his brief.

ARBITRATOR IRVINGS: Well, given the fact he could argue legislative history and based on the question and what's here, let's save the time and you can make reference to it and we can get this person's opinion on it. And it is a small piece of the case.

Let's move on.

MR. MILLER: Okay.

So I can ask the question?

ARBITRATOR IRVINGS: You can ask the question. I haven't admitted it yet.

MR. MILLER: I understand.

ARBITRATION - VOLUME IV

ARBITRATOR IRVINGS: Okay.

MR. RICHMAN: Can I take a moment to read the report?

MR. MILLER: Sure.

ARBITRATOR IRVINGS: Do you want to direct him?

MR. MILLER: Sure. Page 1499 of the report indicates that the Academy Task Force was either led by, or certainly a member was Lawrence Bader who developed the principle that the expert witness is adopting for purposes of this case.

And on Page 1502, the Academy Task Force advocates to Congress certain language and rules be included in connection with how to calculate withdrawal liability.

And I want to ask the witness what he understands the task force to be saying here and whether the recommendation to Congress is consistent with his views and whether he knows, one way or the other, whether Congress in

ARBITRATION - VOLUME IV

adopting 4213 expressly adopted the task force's suggestions.

That's it.

ARBITRATOR IRVINGS: Go ahead.

Ron, have you had a chance to read it?

THE WITNESS: Could I read it? I've never seen this.

ARBITRATOR IRVINGS: Absolutely not. No, you can read it.

THE WITNESS: I'll be honest with you, I have never seen this document before to my recollection, so I would like to read a few pages.

ARBITRATOR IRVINGS: Go ahead.

THE WITNESS: Okay.

MR. MILLER: Okay.

BY MR. MILLER:

Q I'm going to ask you a couple quick questions about this task force report.

On Page 1499, you see that Lawrence Bader's name is mentioned.

Is this the same Lawrence Bader that you were previously testifying about in

ARBITRATION - VOLUME IV

connection with the development of the Bader swap?

A Yes.

Q And if you turn to the fourth or fifth page of the report under the heading Withdrawal Liability, which is Section Number 6, Section Number 6 of the report indicates that this task force is requesting that the withdrawal liability amendments that Congress was then considering be clarified to provide that the total unfunded vested liability of the plan be based on PBGC assumptions for valuing all vested benefits.

Do you see that?

A Yes.

Q And that AAA Task Force recommendation is consistent with your views based on the Bader swap, correct?

A Yes.

Q And just below that, the task force goes on to say that Schedule B numbers are, quote, inappropriate for determining withdrawal liability."

ARBITRATION - VOLUME IV

Do you see that?

A Yes.

Q Right. And what are the Schedule B numbers that they're referring to?

A This was issued, if we look at the date on this document, November 7, 1979, at a time when valuation interest rates were well below PBGC interest rates and so, like a withdrawal liability using valuation assumptions, produced much higher withdrawal liabilities than would have been developed using PBGC assumptions.

And Congress decided to -- did not specifically explicitly adopt this recommendation.

Had they adopted this recommendation at that time, most withdrawal liabilities would have been much lower than they were under practice as adopted subsequent to the enactment of MEPPA.

So Congress did not adopt because they felt that the Schedule B numbers had an actuarial basis, if you would have it, to increasing the withdrawal liability, and

ARBITRATION - VOLUME IV

Congress decided to increase the withdrawal liability.

Q So just to confirm, Congress did not adopt the task force's suggestion in that regard, did it?

A Congress --

Q That's a yes or no question.

A Congress did not explicitly adopt it, but they permitted it within the range of what the actuary would do.

Q But they did not express --

MR. RICHMAN: Let him finish his answer.

A I'm under affirmation to tell the whole truth, not partial truths.

Q No. You are under affirmation to answer my questions. You will have an opportunity to --

MR. RICHMAN: Let him finish. Let him finish.

ARBITRATOR IRVINGS: Finish your answer.

A What Congress did is it let the actuary select an assumption which could be

ARBITRATION - VOLUME IV

the Schedule B or could be the PBGC. It did not explicitly direct the actuary which to do.

Q That's your legal interpretation?

A That's my actuarial interpretation as an actuary having to implement Title IV and having been examined by the Joint Board for the Enrollment of Actuaries on Title IV ERISA.

Q In connection with single-employer plans, am I right that Congress did expressly instruct that PBGC assumptions be used to value vested benefits when a single-employer plan settles its liability, correct?

A Not when it settles it, but when a plan is valued for purposes of turning it over to the PBGC in a distressed termination.

When a plan is settled outside the context of a distressed termination, Internal Revenue Code, Section 417(e), interest rates must be used for lump sums and insurance company quotes would be used

ARBITRATION - VOLUME IV

for buying annuities.

Q And the 417(e) rates are typically tied to corporate bond rates, correct?

A Today they're tied to corporate bond rates. At some times they have in the past been tied to Treasuries.

Q And both corporate bond rates and Treasuries are forms of risk-free rates, correct?

A Yes.

MR. MILLER: We're done with this line of questioning on this document. So will it be admitted?

ARBITRATOR IRVINGS: It's not an actual exhibit.

MR. MILLER: That's correct. It's not -- it doesn't necessarily need to be in the factual record of this case. It's legislative history and you can determine the value of it.

ARBITRATOR IRVINGS: Right. I won't admit it as an exhibit. We can make reference to it.

ARBITRATION - VOLUME IV

THE WITNESS: Should I close this book up?

MR. MILLER: Yes.

BY MR. MILLER:

Q And, in fact, let me ask you this. I do have about 20 minutes left.

Doctor, your testimony discussed the so-called cash flow matching method to develop an investment return assumption or discount rate both in the course of this examination and the examination with Mr. Richman.

Do you remember discussing the so-called cash flow matching method?

A I remember the cash flow method. I don't remember all the things that we discussed.

Q Okay. Do you believe that the Pension Fund here or, more particularly, its actuaries used the cash flow matching method to develop the 7.5 percent rate that they used for funding valuation purposes?

A There's nothing in the reports that I was provided that indicated how they came

ARBITRATION - VOLUME IV

up with the 7.5 percent.

Q Let's assume for purposes of the next question that the 7.5 percent rate was in fact developed by the actuary here using the building-block method.

Assuming that to be the case, would it be proper to use the distinct cash flow matching method to develop a different discount rate solely for withdrawal liability purposes?

MR. RICHMAN: Objection as to the use of the term "proper."

MR. MILLER: Actuarially proper.

ARBITRATOR IRVINGS: Okay. Thank you.

A Number one, I cannot accept as a given that they used the building-block approach because when I observed the information from the different 5500s, the asset mix in different year ends was different. And if they truly used the building-block approach, they would have had different expected return assumptions for

ARBITRATION - VOLUME IV

each valuation.

So I cannot accept that 7.5 was the building-block approach in each and every one of those years because with different asset mixes, it would be highly implausible that they come up with the same answer.

Q So it's your actuarial judgment, even though -- strike that.

It's your actuarial judgment based on what you have looked at that you do not believe that the actuary for this plan in fact used the building-block approach?

A I cannot believe they used the building-block approach and applied it for each and every one of those years, because if they had done so, they probably would have come up with a different expected return on plan assets for each and every one of those valuations.

Q I just want to drill down quickly on this.

Are you sceptical about whether the plan's actuary in this case used the building-block approach for developing the

ARBITRATION - VOLUME IV

discount rate for the time period around which the withdrawal liability calculation was made?

A I don't know whether they did it then or at a different time or whether they just did it at some other date and left the number unchanged. I have no idea when and if they did it.

Q All right.

Now I want to ask a different question. I want you to assume that they did it, okay.

Assume that they developed 7.5 percent using the building-block approach. Given that assumption, would it be proper to use the distinct cash flow matching method to develop a different rate solely for withdrawal liability purposes?

A Well, let's rephrase it that my view is maybe they should have used the cash flow discount method for both.

Q But that's not the question that I asked. Just answer the question.

A So, if appropriate, I think that

the cash flow method is the appropriate method and that perhaps both of them should have been done using the cash flow method.

Q In your experience with multiemployer plans, am I correct that withdrawal liability payments are typically made into the same pool of assets and invested alongside employer contributions and any other sources of income for the pension plan, correct?

A Most multiemployer funds will have one pool of assets where they invest all the money.

Q And that would include the withdrawal liability payments that they receive from the withdrawing employers, correct?

A Correct.

Q And the withdrawal liability payments are used by multiemployer plans to pay all liabilities and benefits just like regular employer contributions, correct?

A All the money is in one trust fund. And under Internal Revenue Section -- I

believe it's 414(l) -- I believe that as a single plan, all assets are available for all benefits.

Q Okay.

Doctor, do you recall that in connection with your direct examination, you discussed a Section 4213 of ERISA which contains the statutory requirement that actuarial assumptions and methods that are used to calculate withdrawal liability need in the aggregate to be reasonable?

A I believe so. If I could have a copy of my report, it would help.

May I look at it?

Q Yes, absolutely.

A So could you repeat the question?

Q Sure. I asked you, frankly, to recall your direct examination testimony and whether in connection with the direct examination you had agreed with the legal proposition that for purposes of withdrawal liability calculations, actuarial assumptions and methods need, in the aggregate, to be reasonable?

A That's what the statute says. It says "must select assumptions and methods which, in the aggregate, are reasonable."

Q And this requirement to select actuarial assumptions and methods that in the aggregate are reasonable, this requirement is not unique to the withdrawal liability context. It also applies to actuaries in other contexts?

A There are other contexts. Some require that each assumption be reasonable, and others require that the assumptions in the aggregate be reasonable. We would have to look at the specific cite to determine whether it is in the aggregate or assumption by assumption.

Q And this requirement that actuarial assumptions and methods be used which in the aggregate are reasonable, does that also apply to a plan and satisfy minimum funding requirements?

A Yes, subject to. In some instances it's a stronger test on funding that they may require each assumption to be reasonable

or it could be in the aggregate -- and I'd have to look at the specifics. I know single-employer plans, it's each assumption. Multiemployer plans, historically was in the aggregate. But I believe they may have made some changes and I'd have to check the exact wording.

Q Do you agree that the use of the same language in these different contexts tends to act as a check on the actuary's discretion?

A The actuary could not -- assuming all the other assumptions are reasonable, the actuary could not select a zero percent discount rate or select a 25 percent discount rate because those would not in the aggregate be reasonable.

So there is some -- I won't call "handcuffing" -- but some limitations put on the actuary.

Q But I asked a slightly different question. My question was: The ERISA statute employ's identical language to describe actuarial assumptions and methods

ARBITRATION - VOLUME IV

to be used in determining whether a plan is satisfying minimum funding requirements and properly calculating withdrawal liability, correct?

A It uses similar language. However, I believe what that does is it puts similar boundaries on both. It does not require the same answer for both.

Q And would it be fair to characterize those boundaries as a check on the actuary's discretion?

A They are limitations on the actuary's discretion. I don't know if you call it a "check." It's a limitation.

Q Do you agree that use of assumptions such as low interest rates, that would tend to increase the fund's unfunded vested liability for withdrawal liability purposes, would also make it more difficult for the plan to satisfy minimum funding requirements if those same assumptions were used?

A Those same assumptions -- if you lower the discount rate for minimum funding,

ARBITRATION - VOLUME IV

the minimum funding requirements would go up and make it more difficult for the fund to satisfy minimum funding requirements.

Q Do you agree with the notion that the discount rate assumption that is used to compute unfunded vested benefits for withdrawal liability purposes is a critical assumption to the analysis?

A The discount rate is a critical assumption in determining withdrawal liability and unfunded vested benefits.

Q Do you agree that --

A But as is mortality and other assumptions.

Q Do you agree that the discount rate used to compute unfunded vested benefits for withdrawal liability purposes must be used for other purposes as well?

A What other purposes?

Q Minimum funding, for example?

A I believe the assumptions are permitted to be the same and are permitted to be different.

Q So am I correct that you disagree

ARBITRATION - VOLUME IV

that the discount rate used to compute unfunded vested benefits for withdrawal liability purposes must be used for minimum funding purposes?

A I got the plus and minus mixed up on it.

I disagree that you must use the same interest rate for minimum funding and withdrawal.

Otherwise, we could say whatever rates you used for withdrawal must be used for minimum funding. Could be argued either way.

MR. RICHMAN: Just answer the question.

Q Are there any other contexts aside from minimum funding in which you believe the same discount rate used to compute unfunded vested benefits for withdrawal liability purposes must be used?

MR. RICHMAN: I'm sorry. Hang on one second.

MR. MILLER: And, Ron, I can rephrase. Let me rephrase. That's

ARBITRATION - VOLUME IV

fine. Make it more clear.

BY MR. MILLER:

Q Do you believe that there are any instances in which an actuary needs to use the same discount rate that it is using to compute unfunded vested benefits for withdrawal liability purposes?

A The actuary has to use discount rates for a myriad of purposes. I have not cataloged them all. Some would use the same as withdrawal liabilities, some would use other discount rates. I can't categorically say which ones without looking at a list of what I'd have to do.

Q Is it your opinion that if a court were to rule that the discount rate used to compute unfunded vested benefits for withdrawal liability purposes must be used for other actuarial purposes, such court would be in error?

MR. RICHMAN: Objection.

A I don't know what other purpose --

MR. RICHMAN: Excuse me. Objection. Are you asking a legal

Page 856

ARBITRATION - VOLUME IV
question here?
MR. MILLER: I'm asking based as an actuarial judgment matter.
ARBITRATOR IRVINGS: You can ask him based on actuarial judgment whether he must use the same. But to ask him to decide whether a court is right or wrong --
MR. MILLER: I'll withdraw the question.
THE WITNESS: I do not have a J.D.
BY MR. MILLER:
Q Dr. Kra, you agree, do you not, that even a single unreasonable actuarial assumption is capable of rendering actuarial assumptions that are used to compute withdrawal liability unreasonable in the aggregate?
A I'm sorry?
Q Let me restate the question.
Do you agree that, if a single actuarial assumption that's part of the withdrawal liability calculation is

Page 857

ARBITRATION - VOLUME IV
unreasonable, that that single unreasonable actuarial assumption is capable, depending on its magnitude, of rendering the actuarial assumptions in the aggregate to be unreasonable?
A A single unreasonable assumption could end up resulting in the withdrawal liability -- or the assumptions in the aggregate being reasonable or unreasonable depending on the other factors, such as are there offsetting assumptions in the other direction or not.
So, for example, if you had all the assumptions which were barely reasonable on one end and then you had another assumption way off the chart just further down, then it would be unreasonable.
On the other hand, if all the other assumptions were just at the upper end on one extreme and this assumption were down on the other side unreasonable, on the aggregate you could have very reasonable results.
So the selection of one

Page 858

ARBITRATION - VOLUME IV
unreasonable assumption does not necessarily determine whether the total result is reasonable or unreasonable.
Q Right. But conceptually, a single unreasonable actuarial assumption, if not offset by other assumptions, could render the actuarial assumptions in the aggregate to be unreasonable, correct?
A A single unreasonable assumption might be unreasonable, let's say, just a smidgen below the regional line --
ARBITRATOR IRVINGS: Okay. Let's move on.
Q Are there other actuarial assumptions that were made in connection with the withdrawal liability assessment against The Times in this case that are, in your view, unreasonable -- strike that.
Is it your judgment that use of the Segal blend assumption is reasonable standing alone?
A I believe that the use of Segal blend assumption as used in this withdrawal liability calculation would give a more

Page 859

ARBITRATION - VOLUME IV
reasonable assumption than the funding valuation assumption.
Q So I take it that's another way of saying, yes, that the Segal blend assumption is reasonable standing alone?
A Standing alone, the Segal blend assumption I believe is a more reasonable assumption than the valuation interest rate.
Q In your view, were there any other actuarial assumptions that were made in connection with the withdrawal liability assessment against The Times that, in your view, were unreasonable?
A As I went through my report, I went through the other assumptions, and I indicated that while I believe that some of them were off by a little in different directions -- and we can go through them -- that they were not so different as to reach the level of unreasonable.
MR. MILLER: I have no further questions.
MR. RICHMAN: Let me have a few minutes and let's finish him before

ARBITRATION - VOLUME IV

lunch.

ARBITRATOR IRVINGS: Yes.

MR. RICHMAN: I have no questions.

MR. MILLER: I would like to pursue further Bader swap -- no, just kidding.

ARBITRATOR IRVINGS: Okay. Fine. Thank you very much.

MR. MILLER: We're off the record.

(A luncheon recess was taken at 12:16 p.m. through 1:39 p.m.)

MITCHELL LEWIS,
having been first duly sworn by Arbitrator Irving, was examined and testified as follows:

DIRECT EXAMINATION BY MR. RICHMAN:

Q Good afternoon, Mr. Lewis.
A Good afternoon.
Q How are you today?
A I'm good. Thank you.
Q Are you currently employed?

ARBITRATION - VOLUME IV

A I'm.
Q And by whom are you employed?
A I'm a partner at WeiserMazars LLP.
Q How long have you been there?
A Twenty years.
Q And what is your current position there?
A Partner.
Q How long have you been a partner?
A Twenty years.
Q What are your duties at Weiser?
A I'm an audit partner and client relationship partner and oversee the audit practice of our Employee Benefit group and our Nonprofit Organizations group.
Q Are you familiar with the NMDU Pension Fund?
A I am.
Q And when did you first become familiar with it?
A Weiser became the auditors there when I joined them in 1997.
Q And did you have a role with respect to Weiser providing services to the

ARBITRATION - VOLUME IV

Pension Fund in 1997?
A Yes, I did.
Q And what was your role?
A I was a partner in charge of the aggregate amount. I had overall responsibility.
Q As partner in charge of the engagement, what services did you provide to the Pension Fund?
A We did the annual audit of the pension, preparation of the Form 5500 and other tasks that might have been needed just in providing service. Also included at times doing some employer audits.
Q Employer audits.
What is an employer audit?
A Visiting participating employers who contribute to the Fund, I review their records for contributions.
Q And you're reviewing their records for contributions for what purpose?
A For accuracy, for completeness, primarily.
Q Is Weiser still the auditor for the

ARBITRATION - VOLUME IV

Pension Fund?
A No, we're not.
Q When did it cease being the auditor for the Pension Fund?
A The year-end May 31, '13 was our final year.
Q When you say year-end May 31, is that the fiscal year?
A That's the Fund's fiscal year.

ARBITRATOR IRVINGS: Did you say '13?

THE WITNESS: Yes.

MR. RICHMAN: Thirty-one, '13.

ARBITRATOR IRVINGS: Yes.

BY MR. RICHMAN:

Q During the time that you were the auditor for the Pension Fund, did you develop an understanding about the basis upon which contributing employers contributed to the Pension Fund?
A Yes, I did.
Q And what was that understanding?
A Based on our understanding of the Funds, employers paid a percentage of

ARBITRATION - VOLUME IV

compensation based on shifts.
Q And how did you develop that understanding?
A Reading the documents, the Collective Bargaining Agreements, discussions with the Fund management.
Q Okay.
With whom in Fund management did you have discussions with about this?
A Our primary contact was the Fund director Murray Schwartz; however, we also interacted with the various individuals that worked at the Fund office.
Q Do you know who those individuals are or were?
A Barbara Albergo was the accountant, bookkeeper.
There were a number of women who worked in the office with various tasks, and I don't remember their last names now. But they each had areas of expertise that they worked on and we interacted with all of them.
Q When you say "we" interacted with

all of them, that means more than just you?
A Yes. Me and the audit team.
Q And I know from 1997 to 2013 is a long period of time.
Can you take us through, going backwards from 2013, who participated on this audit team from Weiser?
A There have been a number of changes during that time period both as a result of people coming and going and promotions, so it would be impossible for me to exactly lay out when and where all of the individuals were. But each year there was an audit team that had a manager and a staff of one or two or three people.
Q Okay. And to whom did the manager report to?
A To me.
Q And during the time you were auditor for the Pension Fund, did you develop an understanding specifically about how The New York Times contributed to the Pension Fund?
A Our understanding was that New York

Times' contributions were no different, their basic contribution, as any of the other contributing employers.
Q And how did you develop that understanding?
A From our years of being there, our reading the Collective Bargaining Agreements, our review of the records reflecting contributions coming in.
Q Now, when you went to a contributing employer to do a payroll audit, what would you do?
A We would randomly select a period of time.
During the period we were reviewing, usually a year period, maybe two years, we would select a weekly period based on payroll, and we would request from the contributing employer their payroll records that related to the participating employees of NMDU.
And we would then use that data to compare it to the contribution reports and the dollars that were contributed to the

Fund.
Q And when you did this audit, did you or your team go to the contributing employer, or was this done your office?
A In most cases, we would go to the offices. There were certain electronic records that were transferred back and forth, but generally we would go to the contributing employer's office.
Q Have you been to The New York Times' offices?
A I have not, no.
Q But members of your team have been there?
A Yes, I believe. My recollection is yes.
Q Okay.
And who decided whether to conduct of a payroll audit of a contributing employer?
A Fund director would talk to us and then he would talk to the trustees, and it would come as a starting point from there.
Q Who was the person, if there was

ARBITRATION - VOLUME IV

one person, or group of people, if there was a group of people, who actually told you to go do an audit of X-employer?

A Fund director.

Q That's Mr. Schwartz?

A Yes.

Q You testified already that you oversaw the performance of an annual audit?

A Yes.

Q And can you take us through the process of doing that?

A ERISA requires Form 5500 to have an audit attached to it.

The audit is conducted by an independent auditing firm, independent qualified public accounting firm, which we were, to give an opinion on the financial statements and the attached footnotes. Notes of the financial statement.

And that was our primary responsibility of the audit team.

Q And how would you go about fulfilling that responsibility?

A Well, they thought it was a

ARBITRATION - VOLUME IV

risk-based approach, so we would review what we believed to be the risk areas and focus our procedures in those areas: Investment portfolio, evaluation of investments, confirmations would be sent, review of pricing, review of contributions by contributing employers, operating expenses of the Fund; all those factored into the various procedures that we performed the duty on.

Q What was the end result of your audit?

A Well, the end result was an issued opinion that was signed and attached to the Fund's financial statements.

Q And who signed the opinion provided by Weiser to the Pension Fund?

A I signed the opinion.

Q Let me show you Exhibit 65.

If you can take a look at that, thumb through that. I'm not going to ask you to read the whole thing, but just take a look and see what is encompassed within the exhibit.

ARBITRATION - VOLUME IV

A Okay.

Q Can you identify for us what this is?

A This appears to be the filing of the Form 5500 which includes the audited financial statement for May 31, 2003.

Q Okay. And what I would like you to turn to, where I have my green tab. Just kidding.

If you look at the numbers at the top, you'll see at the very top is the last four numbers, 0294.

Sorry. Page Numbers 0028, which is in the second line.

Do you see that?

A Yes.

Q And if you turn to 0035.

A Yes.

Q And on the top of that page, the page itself is numbered 2.

Do you see that?

A Yes.

Q And there is a heading called Contributions and there is a sentence that

ARBITRATION - VOLUME IV

says, "Participating employers contribute to the plan based on the number of shifts worked by employees as defined by the Collective Bargaining Agreements. The plan is noncontributory for employees."

Do you see that?

A Yes, I do.

Q And did you write that sentence?

A I reviewed this sentence. I'm not sure I technically wrote it.

Q Okay. And is there somebody else who wrote the sentence?

A Well, the footnotes are the representation of the Fund. So as auditors, we are -- we give an opinion on the accuracy, the fairness of the financials including the notes. So, technically, they are not our notes, they're the Fund's notes, but we review them with Fund management for accuracy.

Q Okay. And did you review this note about contributions with Fund management?

A Yes.

Q And who at Fund management did you

ARBITRATION - VOLUME IV

review it with?

A Fund director.

Q Mr. Schwartz?

A Murray Schwartz, yes.

Q Did you review all the notes with Mr. Schwartz?

A Yes.

Q Can you tell me about that process?

A We liked to read the notes to the financial statements before the financials were issued, and so he would go through them with us at sort of an exit meeting prior to the finalizing of the audit process.

Q So were you present when he was reviewing these notes?

A I was.

Q Did he ask questions?

A Sometimes he does -- he did, yes.

Q Do you recall him having any questions about the Contributions section?

A No, no.

MR. RICHMAN: I'll ask Miguel, I've got two more like this exactly. I can go through them if you would

ARBITRATION - VOLUME IV

like.

MR. EATON: Just tell me which ones they are.

MR. RICHMAN: Page number is 37. And then the next one is 33.

I'm sorry, let me retract that and let me just go through it. It may just be easier.

BY MR. RICHMAN:

Q So if you turn Exhibit 66.

Do you see that?

A Yes.

Q Can you identify what this is, Exhibit 66?

A This is the notes to the financial statement for the year ending May 31, 2004.

Q And if you take a look at Page 37, which is also has "Page 2" on the top of the actual page, what process did you follow in dealing with this statement about contributions?

A We would have reviewed the financial statement with Mr. Schwartz, and either he accepted it as it was or he'd

ARBITRATION - VOLUME IV

modify if he thought that was appropriate. And we would go and conclude the process and then move forward with our process of issuing and completing the audit.

Q Did he have any issue with this description of contributions?

A No, he didn't.

Q Let me have you turn to 67.

Do you see that?

A I do.

Q And can you tell us what that is?

A These are notes to the financial statements for the financial statement period ending May 31, 2005.

Q And let's see if I can shorten this.

Did you follow the same process in issuing the report, the auditor's opinion, as you did for the two previous ones that we just took a look at?

A We did. We took the same approach, same process.

Q Let's turn to Page 33 of Exhibit 67.

ARBITRATION - VOLUME IV

A I'm here.

Q And you see it says "Contributions"?

A Yes.

Q And this time there's a 7 on the bottom of the page, right?

A There is.

Q And this description is different than the description in the two previous exhibits, 65 and 66, correct?

A It is.

Q Can you tell us the process as to how the language was changed for this audit report?

A Well, this is eight, nine, ten years ago, so it's hard to remember exactly what happened with the discussions at the time.

However, there were occasions when Mr. Schwartz would read something and think that it should be better described or expanded a bit. And so that's what was done here.

I do recall there was a particular

discussion about some of the contributions not relating to Collective Bargaining Agreement. For example, the Union made contributions not under Collective Bargaining Agreement but under something similar.

So my recollection is at the time they were reviewing that and if -- where he felt this footnote should be expanded.

Q Okay.

And if you take a look at the second-to-last sentence of that description, it says, "In addition, under certain circumstances specified in their Collective Bargaining Agreements, participating employers made contributions to the plan for shifts that were paid but not work by their employees."

Do you see that?

A Yes.

Q And that is in addition to what was in 65, Exhibit 65 and 66, correct?

A Yes.

Q And how did that get in there?

A Again, I'm just trying to recall.

The opening sentence talked about shifts worked, and there must have been some conversation at the time: Well, there are contributions made for nonworking shifts, vacation, sick, Workers' Comp, things like that. So he must have felt we should expand the description a bit to include those factors.

Q And did you agree with that?

A We did.

If I could just say one thing. The opening paragraph in Note 1 says it's just a brief description.

So the details, the real details to the Collective Bargaining Agreement are in the Collective Bargaining Agreements themselves. This is just a summary based on the account standards.

Q Thank you.

During the time that you were the auditor for the Pension Fund, was Mr. Schwartz always the Fund manager?

A I recall the very first year -- as

a partner at M.R. Weiser, Mr. Schwartz was the Fund manager the whole time.

Q And during the time that you were the audit partner for the Pension Fund, did the process of meeting with Mr. Schwartz, did the reviewing the footnotes change?

A They did not change. Except the very final year, May 31, '13, was different because the Fund office had just closed and that report was issued in March of '14. So during that time, we did not have that conversation with Mr. Schwartz.

MR. RICHMAN: Now, Miguel, I can go through 68 through 75.

Do you want to take a look at them and see if --

MR. EATON: Yeah, let me take a look at them.

MR. RICHMAN: Sixty-eight is Page 61 and it's -- the Bates Number is 1487.

MR. EATON: Okay.

MR. RICHMAN: Sixty-nine is Page 59. And it's Bates 1793.

Exhibit 70, it is -- the Bates numbers is easiest to go by -- 2042.

MR. EATON: Okay.

MR. RICHMAN: And Exhibit 71 is Bates 1572.

MR. EATON: Okay.

MR. RICHMAN: And 72 is Bates 1719.

MR. EATON: Okay.

MR. RICHMAN: And 74 is Bates 1953.

ARBITRATOR IRVINGS: 74? What happened to 73?

MR. RICHMAN: Oh, okay. Seventy-three was the --

Seventy-four is the amended --

We can do 73.

ARBITRATOR IRVINGS: I'm sorry. On 73, it's on Page 2118.

MR. EATON: Seventy-three is fine with us.

MR. RICHMAN: And 74 is on 1953.

MR. EATON: Okay for 74.

ARBITRATION - VOLUME IV
MR. RICHMAN: And 75 is on 1637.
MR. EATON: Okay.
MR. RICHMAN: And 76 is 1869.
MR. EATON: Okay.
BY MR. RICHMAN:
Q Mr. Lewis, maybe we'll just take a look at Exhibit 76 so you can take a look at the language.
And we're going to Bates Number 1869 which is on the bottom.
Okay.
And in the second-to-last sentence of the paragraph under Contributions, it says, "Under certain circumstances ..."
Do you see that language?
A Yes.
Q "... specified in the Collective Bargaining Agreements."
Can you give us an example of those circumstances?
A Vacation pay, not worked, but was paid. Workers' Comp.
Q Were there others as well?

ARBITRATION - VOLUME IV
A Sick. I don't recall exactly. Those are certainly a number of days that fell into this category.
Q Now, when you did a payroll audit, did you note the position of the person for whom the employer was contributing?
A No, we would not know the position.
Q And what would you see or look at?
A We would see payroll journals that would list the individual employees of the contributing employer and their pay for that period, gross pay, the net pay, withholdings.
I don't recall exactly, but generally that's what the pay would have. It might have -- that's primarily --
Q What you would look at?
A What we would look at.
Q Were there ever situations where you had questions for the employer, contributing employer?
A There were occasions, yes.
Q And how did you deal with those questions?

ARBITRATION - VOLUME IV
A We had a -- whoever the contact was at the contributing employer we were interacting with would be the person we would ask questions of.
Q Did you discuss your annual audit reports at a trustees meeting?
A We did discuss our annual reports, yes.
Q And what was the nature of the discussion?
A The reports had already been issued and returns had been filed by that time.
Generally, just an overview of the audit, and the report itself was included in the package of all the trustees.
Q I just want to make sure I understand.
Did the trustees have a copy of the annual audit?
A Yes.
Q Did you ever get a question from Mr. Hayes with respect to the contribution footnotes that we were looking at?
MR. EATON: I'm going to

ARBITRATION - VOLUME IV
object. It's vague. There's a long time period going on here.
ARBITRATOR IRVINGS: Ever? Go ahead. I'm saying at any point did Mr. Hayes object to -- that's fine.
MR. RICHMAN: Okay.
BY MR. RICHMAN:
Q Did at any point Mr. Hayes, during the time he was a trustee, object to the language of the contribution provisions that we've been looking at in your audit reports?
A No.
Q Did any of the trustees other than Mr. Hayes at any time object to the language that was in the Contribution section of the audit report?
A No.
Q Did Neal Schelberg?
Do you know who Neal Schelberg is?
A I do.
Q And who is he?
A One of the counsels to the Fund.
Q Did Mr. Schelberg at any time object to the language of the Contributions

ARBITRATION - VOLUME IV

section in your audit opinion?
A No, no.
Q Let me just ask a collective: Did anybody object to the language concerning the contribution provisions that was reviewed in your audit report?
A No, no one ever did.
Q Did you ever review -- I'm sorry. Withdraw that.
Did the Fund have a standardized remittance report for employers to use in contributing to the Fund?
A No. The Fund did not have a standard format.
They accepted the reporting formats of the individual contributing employers.
Q And were all the formats the same as the contributing employers?
A They were all different.
Q I saw you smile.
A Each contributing employer had their own system, software, formats, and the Fund office accepted them as they were.
Q I want to turn to Exhibit 72 again,

ARBITRATION - VOLUME IV

if I may.
So you could turn to the Bates Number 1684, please. It's Schedule R.
A Okay.
Q Now, what is Schedule R a schedule to?
A Schedule R is an attachment to Form 5500.
Q And for the Pension Fund, did you complete Schedule R?
A Yes, we did.
Q And can you tell us what shows up on Schedule R?
A This was a schedule of contributing employers that had contributed more than 5 percent of total contributions for the plan year.
Q And you see Exhibit 72, can you identify the contributing employers who contributed more than 5 percent of plan year to the Pension Fund?
A Daily News, New York Times, New York Post, Hudson News, Newark Morning Ledger.

ARBITRATION - VOLUME IV

Q If you would look at on the left-hand side, do you see the Number 13?
A Yes.
Q And go down to E.
Do you see that?
A I do.
Q And it says, "Contribution rate information (if more than one rate applies, check this box and see instructions regarding required attachment), otherwise complete Items 13E1 and 13E2."
Now, in Exhibit 72, the box is checked.
Did you check that box?
A We did.
Q Okay. And did you attach something to the schedule?
MR. RICHMAN: Do you mind if I help him find the page?
MR. MILLER: That's fine.
BY MR. RICHMAN:
Q If you take a look at 1709. And if you can tell us what that is.
A This was just a supplemental

ARBITRATION - VOLUME IV

schedule showing different rates based on these particular shifts that were worked.
Q Okay. And you say "shifts that were worked." Where are shifts on this page?
A The day rate, the short night, the long night. Saturday night is a particular day of the work week and it was known as a shift.
Q And you see on the right-hand side of the page, it says daily high rate, daily low rate with numbers?
A Yes.
Q What are those numbers?
A Those are the dollars required to be contributed for that particular shift that was worked in particular for those employees.
Q Let's go back to 1684, please.
You got that?
A I do.
Q So if you look E2, it says "base unit measure" and it has a box for hourly, a box for weekly, a box for unit production.

ARBITRATION - VOLUME IV

And then it has a box that says "other specify."

I'm just reading the form parts right now.

A Yes.

Q And you filled that in by checking the box and writing "8 percent of daily wage rates."

A We did.

Q Why did you do that?

A Because that's what the Collective Bargaining Agreement called for.

Q Do you know what a base unit measure is?

A It's not a term I used. So generally, no.

Q Now let's go to 74.

There were two --

Exhibit 73 is a Form 5500 -- and you can look at it in your book -- for the year 2010.

And Exhibit 74, if you flip, there's also a Form 5500 for the year 2010.

Do you see that?

ARBITRATION - VOLUME IV

A Yes.

Q How come there were two that year?

A There were two because the second form was an amended return because of inaccuracy in the census information.

Q In the census information.

Did it have anything to do with the contribution rate?

A No.

Q Okay. So take a look at Exhibit 74, please. And take a look at 1914.

A Okay.

Q Now, on the left-hand side of the page under 13, you see the names of the contributing employers?

A Yes.

Q And is there any difference in the way you filled out this for 2010, Exhibit 74, and what you did for the prior year?

A No difference, other than the dollar amounts, that I recall.

Q Okay. Let's turn to 1940, please,

ARBITRATION - VOLUME IV

of that same exhibit.

A Okay.

Q And is that information any different than the information that you provided in Exhibit 72?

A It's the same format.

Q And if you flip back and forth, you see the rates are different.

A If the rates are different, it's because there was a new updated Collective Bargaining Agreement or something that would have changed the rates.

Q But the format is the same?

A Yes.

Q Now, let's take a look at 75, Exhibit 75, please.

So if you take a look at Bates Number 1611, please.

A Okay.

Q Is this the same format as the other two that we looked at?

A Yes, it is.

Q And you see 13E has a check in the box.

ARBITRATION - VOLUME IV

Do you see that?

A Yes.

Q But it's hard to prove a negative, but I can tell you having looked through this, there is no attachment.

A Right.

Q And if you take a look at 76, 1834. And 13E, you checked the box.

Do you see that?

A Yes.

Q And I can tell you -- we can all take a look and if someone finds it they get extra points, because we haven't been able to find an attachment for either Exhibit 75 or 76.

And can you tell us why there is no attachment?

A I cannot.

Should have been attached.

Q Did you ever do an audit of C & S?

A We did do an audit of C & S.

Q Do you know who asked you to do that audit?

A Fund director, Mr. Schwartz.

ARBITRATION - VOLUME IV
Q Do you know why he asked you to do that audit?
A Because C & S was closing and the Fund felt that before the records scattered, that it makes sense to go in there and review and do procedures to see about the compliance with the contributions.
Q And were you involved in that audit?
A I was.
Q And what was your role in the audit?
A I oversaw the process and procedures.
Q Let me show you Exhibit 51.
Do you see that?
A I do.
Q And these are minutes of a trustees meeting; is that correct?
A Yes.
Q Let's turn to page 1244.
You see Roman numeral VII and you see C?
A Yes.

ARBITRATION - VOLUME IV
Q And there is a discussion about the City & Suburban audit?
A Yes. I see that.
Q And it says that "attached hereto as Exhibit G." It's a letter from you dated April 20, 2010.
Do you see that?
A I do.
Q And before we turn to that exhibit, if you turn the page to 1245, you see the last sentence says, "A meeting has been scheduled to discuss and reconcile the findings with the employer after which you advised the Pension Fund accordingly."
Do you see that?
A I do.
Q And did you ever schedule a meeting with C & S?
A We did. Technically, we had our meeting with The New York Times.
Q And why did you have the meeting with The New York Times?
A Because they were our contact. The records were maintained by The Times and

ARBITRATION - VOLUME IV
those were the individuals we were directed to contact to do the audit.
Q And let's go to what is marked Bates Number 1246, please.
A Okay.
Q And can you tell us what that is?
A Well, this is just the first page of the memo communicating our findings of procedures that we did related to C & S.
Q Okay. And I can't read her name because her initials are hiding somewhere in the letters. Ivy --
A Narissi.
Q Ivy Narissi.
And who is she?
A She works at WeiserMazars as a manager.
Q And what was her role in connection with this audit?
A She's more directly involved with the team that actually did the testing and supervised and managed them, and she reported to me.
Q Okay. The work that was done on

ARBITRATION - VOLUME IV
this audit, was any of it done at the offices or facilities at The New York Times?
A I can't say specifically. I believe they were.
Q And if you look at the second paragraph on the front page of the memo, it talks about, at the bottom of that paragraph talks about, "The procedures and findings are as follows."
And can you describe to us what were your procedures and findings?
A Well, as we wrote here, we requested the payroll reports for these periods that we selected. We recalculated the shifts that were worked for the employees that we had selected, and we compared them to the transmittal reports which was the reports of contributions to the Fund, to compare to see if there were any differences between shifts that were worked and shifts that were contributed for.
Q Okay.
And when you said from the weekly payroll reports we recalculated the number

ARBITRATION - VOLUME IV
of shifts, why did you have to recalculate the number of shifts?
A I'd be guessing. Either the numbers weren't there, the shifts were not easily reconcilable from the reports we had, but it was something that we had to do.
Q Okay.
Well, the Pension Fund contributions came in on what basis? I'm talking about a time period.
A Monthly, I believe.
Q And when did Welfare contributions come in?
A I believe weekly.
Q And did The Times report shifts on a monthly basis?
A They reported shifts -- I believe they reported shifts on a monthly basis.
Q On a monthly basis?
A You know, I don't want to guess. I don't recall exactly.
Q The second point that you have is, "The test of qualifying shifts included verification of inclusion of paid absences

ARBITRATION - VOLUME IV
such as vacation days, paid sick days, et cetera in the computation of contributions."
What is the "test of qualifying shifts"?
A That was our review of these payroll records to see that all the shifts were included -- "qualifying shifts" meaning somebody might have worked or just been paid for nonworking shifts to see that they were included in the contributions.
Q If you turn the page to 1247, Bates number.
Do you see that?
A Yes.
Q At the top, it's A, Finding.
Can you tell us what your finding was?
A Our finding was that the rate that was used to calculate the shift contribution was different than what we believed it should have been.
Q And what did you believe it should have been?

ARBITRATION - VOLUME IV
A Based on the shift contribution rate.
Q And what was it based on?
A It was a fixed amount. It's the same dollar amount for all employees rather than distinguishing the type of day or work period they worked.
Q Okay.
When you say day or work period --
A Meaning a long day, a long night, a Saturday night. All of those have different rates. But these contributions were all paid based on the same rate.
Q Okay.
And then you reached a conclusion. And you say, "This is inconsistent about how Welfare contributions are calculated."
Why are you mentioning Welfare contributions?
A The testing that we do are both Welfare and Pension since the participants or the employees were the same, and the shifts process was the same as well.
So for Welfare, they were paying

ARBITRATION - VOLUME IV
based on the shifts and the percentage, but for pension, they weren't. And that's why we made that notation.
Q Let me take you to Exhibit 45.
A Okay.
Q So this was a trustees meeting?
A Yes.
Q Okay. And you see on Page Bates Number 1250, there is a -- says that you "reviewed the final results of the payroll audit of the City & Suburban Delivery Systems, Inc."
Do you see that?
A Yes, I do.
Q And did you actually do that with the trustees?
A I don't know if we did it with the trustees or we did it with Fund counsel and Fund director.
Q Well, Exhibit 45 is a minutes of a meeting of the trustees, if you turn to the front page.
A Right.
Q Okay.

ARBITRATION - VOLUME IV

And these are minutes of that meeting. The B on Page 1250 is minutes of that meeting?

A Yes.

Q Do you have any reason to believe that you didn't review it --

A No.

Q -- with the trustees?

A No. I'm sorry. You are right.

Q Just so the record is clear --

A I was looking at it because the date of the letter was in June and the trustees meeting was in December. So it was reviewed with the trustees three months later. That's all I was trying to say.

Q Okay. Got it. Thank you.

And let's take a look at Page 1251 Bates number.

A Okay.

Q And can you tell us what this is?

A This was a summary after more detailed reviews. And the review with individuals I guess at The Times related to C & S to conclude on what the dollars were

ARBITRATION - VOLUME IV

that resulted in the underreporting that we identified in our procedures, previously talked about.

Q Okay. And would you take a look at the second paragraph. "To address these discrepancies, Weiser held meetings, numerous phone calls and e-mail communications with The New York Times over the past few weeks to finalize a total underreporting of contributions to the Pension Fund."

Do you see that?

A Yes.

Q Do you have knowledge who at Weiser participated in those meetings?

A The manager in the engagement, Ivy Narissi, and myself.

Q And do you recall who you met with at The Times?

A Not specifically.

Q Okay. Do you recall where you met?

A Probably the meetings might have been at The New York Times with my staff. I remember having some phone conversations.

ARBITRATION - VOLUME IV

So between us, we did these different things.

Q Okay. And let's take a look at Bates Number 1252, please.

And if you would look at the top of the page, it says "Result."

A Okay.

Q Do you see that?

A Yes.

Q "Times agreed that the hourly rate calculation should only be used for apprentices" and recalculated the period January 1, 2007 through December 31, 2008.

And how was that recalculated?

A The Times went back and refigured, recalculated again based on the appropriate shift rates for the individuals during that period. It was too cumbersome and voluminous for us to have done that.

Q Okay.

When you discussed this issue at the meeting on September 24, 2010, did anyone object to your findings?

A No, no one objected.

ARBITRATION - VOLUME IV

Q Did anyone raise questions about the basis on which The Times should be contributing to the Pension Fund?

A No.

MR. RICHMAN: I just want to take about five minutes.

ARBITRATOR IRVINGS: Sure. Thank you.

(A brief recess was taken.)

MR. RICHMAN: Back on.

ARBITRATOR IRVINGS: Go right ahead.

MR. RICHMAN: Okay.

BY MR. RICHMAN:

Q Mr. Lewis, could you tell from Exhibits 45 and 51 how much money was due from The Times that The Times paid as a result of its paying an hourly rate versus a shift rate?

ARBITRATOR IRVINGS: I'm sorry. Again, the exhibit?

MR. RICHMAN: Forty-five and 51.

A I can tell the total amount. Total amount, yes.
Q And what was that?
A $343,289.
Q But was that the difference of paying between an hourly and a shift rate?
A I'm sorry, I can't --
Q Let me put you on Exhibit 51.
A Okay.
Q And specifically Page 1247, the Bates number.
A Yes.
Q You see that?
A Yes.
Q You see at the top it says "Findings"?
A Yes.
Q And you see your conclusion?
A Yes, I do. Approximately $25,000.
MR. EATON: I'm sorry. What page?
MR. RICHMAN: 1247, in 51.
MR. EATON: Yes.
MR. RICHMAN: Okay.

MR. EATON: And which conclusion are you looking at.
MR. RICHMAN: I was looking at the conclusion under A.
Q You see there is an A and a B?
A I do.
The A Finding dollars was really just an approximation.
Q Okay.
A It was really unclear at the time.
Q Okay.
And is there any -- okay.
Now I want to look at Exhibit 45. Can you tell us there how much the actual number was?
A Page 3 there is a Finding A, B and C.
Q Yes.
ARBITRATOR IRVINGS: Of 45?
MR. RICHMAN: Of 45, yes.
A Re: Calculation, approximately 24,000.
Q And that's on 1253, Bates Number 1253?

A Yes.
Q Under Finding A?
A Under Finding A.
Q Were The New York Times remittance reports easy to use?
A They were not.
MR. EATON: Objection.
ARBITRATOR IRVINGS: What's the objection?
MR. EATON: What sense -- it's a vague question.
ARBITRATOR IRVINGS: Well, do you have a follow-up question?
Go ahead.
BY MR. RICHMAN:
Q Why?
A There were a number of different reports that were submitted by The New York Times for various components of contributions as well as just the format of the reports and the layout of the shift information.
Q What specifically about the layout of the shift information?

A Well, the shift information really came through the Welfare reporting documentation but it was also used for the Pension as well. So same report.
Q And why did that or did it not make that easy or difficult to use?
A Welfare Fund contributions were more frequent than the Pension contributions during the reporting period, so it made it difficult to track one to the other.
Q But were you able to do that?
A Generally.
MR. RICHMAN: I have no further questions.
MR. EATON: Why don't we go off the record while we rearrange the room.
CROSS EXAMINATION BY MR. EATON:
Q Good afternoon, Mr. Lewis.
A Good afternoon.
Q You testified on your direct that -- I think, correct me if I'm wrong -- that you are familiar with how the Pension Fund tracks employer contributions?

ARBITRATION - VOLUME IV

A Yes.
Q And you are familiar with the remittance reports that employers send to the Pension Fund?
A Yes.
Q And I think you testified that the reports are not identical from employer to employer; is that right?
A That's right, yes.
Q And even the schedule on which the employers report are not the same; is that correct?
A Yes, that's correct.
Q And one of your roles as the auditor was to conduct an annual audit of the Fund; is that right?
A Yes, that's right.
Q And is it fair to say that the goal was to ensure that the Fund is receiving the proper amount of contributions from each contributing employer?
A The goal of the annual audit is to be able to determine whether the financial statements present fairly the financial

ARBITRATION - VOLUME IV

position and changes in net assets.
Q Okay. And I guess is it fair to say that a part of ensuring what you just mentioned, a part of that would be to ensure that the employer contributions are what they're supposed to be; is that right?
A Fairly presented.
Q And when you conducted --
ARBITRATOR IRVINGS: Just so I'm clear, is that a different answer?
THE WITNESS: I'm just trying to be clear that the auditor gives an opinion on fairness, fairly presented.
So however you ask the question, the answer is still the audit opinion is based on present fairly, not total accuracy.
ARBITRATOR IRVINGS: I want to clarify. If we're talking about the distinction between what the purpose of the annual Fund audit is versus what the purpose of an audit in an

ARBITRATION - VOLUME IV

employer's contributions.
MR. EATON: Understood. We're talking about the annual Fund audit.
ARBITRATOR IRVINGS: Okay.
BY MR. EATON:
Q Can you describe what you mean by "fairly presented"?
A That is an audit standard generally accepted in the United States, presents fairly.
No material differences. A reader would not come to a different conclusion if the financial statements were presented differently.
Q Okay. So is materiality, is that a threshold?
A Materiality is a component of the audit, yes.
Q And so for an audit for a fund of this size -- when I say fund, I mean the NMDU Pension Fund -- what is material for a fund of this size in the annual audit context?
A Materiality was based on Fund

ARBITRATION - VOLUME IV

assets, total assets. So materiality was probably a million dollars.
Q A million dollars meaning plus or minus of the results of your audit?
A Yes.
Q And the process of conducting the annual Fund audit, is it fair to say that you would take a sampling of contributing employers and review their remittance reports as part of that audit?
A Yes.
Q Would a sampling be three or four employers in a particular year or higher or lower than that?
A With this Fund it was usually, since there was a smaller group of very large contributors we usually looked at the same employers each year.
Q And was The New York Times one of those employers you reviewed every year in connection with the Fund audit?
A Yes.
Q And is it fair to say you are familiar with The New York Times remittance

reports in particular because they were part of that annual audit?

A Yes.

Q And for The Times Pension remittance reports, did they report shift information at all on those reports?

A The Welfare Fund reports had the shift information and that was also used for Pension.

Q My question is a little bit different: On the Pension Fund remittance reports, was there any information about shifts on The New York Times remittance reports?

A I don't recall seeing that.

Q And for the Times Welfare reports, that did include information about shifts; is that right?

A It did.

Q And on those Welfare remittance reports from The Times, did they differentiate the type of shift that was being reported?

A I'm sorry. I really just don't

remember the details to the remittance reports themselves.

Q And is it your understanding that employees for The Times worked different kinds of shifts?

A Yes.

Q And what were some of those types of shifts?

A They were day shifts and night shifts and weekend shifts.

Q Let me turn to Exhibit 48.

Have you ever seen this document?

A I don't recall. Something similar. This one exactly, I don't remember.

Q And is it fair to say that that's a pension remittance report for The New York Times?

A My recollection would be yes.

Q And now let's turn to Exhibit 86.

Let me know when you are there.

A Okay.

Q The Bates Number is FUND-98 and the cover e-mail is an e-mail from Todd Jackson to Barbara dated June 9, 2011.

If I could direct your attention to beginning on the second page.

And the Subject from the first page says "Weekly deliverers deduction PPE 6-4-2011."

Do you see that?

A Yes.

Q If I could direct your attention to the second page.

Are you familiar with this type of document?

A Generally. Not specifically this document.

Q Is it fair to say that this is a Welfare remittance report for The New York Times?

A I don't know in particular that that's the case.

Q Let's look back at the first page.

And it's from Todd Jackson.

And do you see on the signature line it says "NYT Shared Service Center"?

His e-mail signature line at the bottom of the e-mail.

A Oh, sorry. Yes.

Q Are you familiar with what the New York Times or the NYT Shared Services Center is?

A I am.

Q And what is it?

A A common administrative area for The New York Times and its subsidiaries or affiliates where record-keeping takes place.

Q And when you had interactions with The Times with respect to the Pension Fund, did you deal with people at the New York Times Shared Service Center?

A I really don't recall. The documents that I saw were directed to particular New York Times employees. I don't know if they're from the Shared Service Center or someplace else.

Q Under "Attachment" it says "Weekly deliveries deductions."

Do you see that?

A Yes.

Q And the body of the message says, "Attached is the weekly deliverers report."

ARBITRATION - VOLUME IV

Do you see that?

A Yes.

Q Does this e-mail give you more comfort that this is a New York Times Welfare remittance report?

A Well, that's what the cover to the e-mail says. I can't swear that this was attached to it.

Q Okay. Fair enough.

The actual attachment was produced in native format, but this comes from the Fund.

Didn't you testify on direct that you were familiar with the remittance reports?

MR. RICHMAN: Objection.

A Generally, yes.

Q So generally speaking, was this the type of report you were used to seeing from The New York Times?

A There were a lot of reports that The New York Times had and they used a lot of acronyms and shorthand and so I don't remember exactly what DELCOL is.

ARBITRATION - VOLUME IV

ARBITRATOR IRVINGS: Ron, do you have any dispute about what this is?

MR. RICHMAN: I don't have any dispute about what it is, but it's really the issue with would the witness have been able to --

MR. EATON: Ron, let's look at his deposition on Page 56.

MR. RICHMAN: Well, are you asking me a question or --

MR. EATON: I was just directing you to where I was.

MR. RICHMAN: Okay.

MR. EATON: And for the record, I'm looking at his deposition on Page 56. And I'll ask it this way.

BY MR. EATON:

Q Mr. Lewis, do you recall at your deposition being asked the following question: "And was shift information in that" --

A Excuse me.

Q On Page 56, do you recall being

ARBITRATION - VOLUME IV

asked the following question: "Okay. So would you have to look at the Welfare reports in order to get the shift information to review The New York Times' pension contributions?"

Answer: "Yes."

A Yes, I recall that.

Q So for you to get shift information, you would not look at The Times pension reports but you would look at the Welfare remittance reports; is that fair to say?

A Yes.

Q In their remittance reports for Welfare, did The Times differentiate the type of shift that was reported? Excuse me, the type of shift that was worked?

A So I just don't recall.

Q Let me direct your attention to Page 50 of your deposition, beginning at Line 8.

Question: "The employer reports that come in, do those differentiate shifts in any particular way? Let me give you an

ARBITRATION - VOLUME IV

example that may be clearer.

"Does it say weekday shift versus Saturday shift versus night or does it just say, quote, shift?"

Answer: "My recollection is it just says 'shifts.'"

Question: "And when you look at the computer screen on the Fund database, does that differentiate between the types of shifts?"

Answer: "I don't recall it differentiating."

Do you recall those questions and did you give those answers?

A Yes.

Q So is it your understanding then that The Times makes Pension contributions based on the type of shift worked?

A Yes.

Q So let me unpack that just a little bit.

So if Employee Smith works three shifts in a week and one is for a day shift and one is for a night and one is for a long

ARBITRATION - VOLUME IV

night, The Times according to your understanding would make three different levels of Pension contribution based on those different types of shifts; is that right?

A Yes.

Technically, the contribution was a percentage of compensation, so if compensation changed slightly depending on the day, then the contribution would change in the same pro rata way. Because percentage was the same, 8 percent.

Q Now, for the audit, if you did not know the type of shifts that the employees worked, how did you ensure that The Times sent in the proper Pension contribution for those employees?

MR. RICHMAN: Can we just -- talking about the annual audit.

MR. EATON: Talking about the annual audit.

MR. RICHMAN: Okay. Just making sure.

A We used just an analysis of a range

ARBITRATION - VOLUME IV

of shift dollars that would be contributed from the high to the low in terms of what the dollar amount would have been. And we would compare the totals that were contributed and see if it fell within the range.

So if it was between the high and the low range, then that was accepted during the audit process.

Q Okay. So, but that information was not based on any knowledge of the number of day shifts worked by the work force, versus the number of night shifts worked by workforce; is that right?

A Yes, that's right.

Q And so explain to me how the process that you followed would actually ensure that The Times contributed the amount that they were supposed to contribute for the Pension Fund?

MR. RICHMAN: Objection. That's not the testimony here. This is an issue of materiality because we're dealing with the annual audit.

ARBITRATION - VOLUME IV

MR. EATON: It would be helpful if the witness can provide the answer.

ARBITRATOR IRVINGS: Absolutely, but I think this does go to the question about whether we're talking about what they determined for the annual audit as opposed to what they determined where they're auditing the contributions of an employer.

MR. EATON: And I'll get there.

ARBITRATOR IRVINGS: That's fine.

Then go ahead, please answer the question.

A Our procedures during the annual audit was an approximation. It was a range.

Q And so did that procedure or that standard that you wanted to meet change at all when conducting a payroll audit for an employer versus an annual audit for the Fund?

A Yes, because the records were different, were more detailed.

ARBITRATION - VOLUME IV

Q Did you ever conduct a payroll audit of The New York Times?

A We did.

Q And when you conducted a payroll audit of The New York Times, did you have the information that broke out the types of shifts worked?

A Yes, because we saw what the individual was earning, and the earnings corresponded to the shifts.

Q That wasn't my question. I think I asked a slightly different question.

Did you have data or information from The Times about what type of shift the employees worked when you conducted a payroll audit of The Times?

MR. RICHMAN: Objection. Asked and answered.

ARBITRATOR IRVINGS: No, I don't think so.

Go ahead.

A I believe we had the information we needed to do that, because we saw the pay that was earned during the period and the

ARBITRATION - VOLUME IV

earnings for the period corresponded to the shifts.

Q Is it your understanding that the shift information for Welfare reports on The New York Times were concurrent with the shifts worked for employees receiving pension contributions?

A Yes.

Q And what is the basis of that understanding?

A It's part of the contribution process. I understood it from discussions with the Fund office.

Q Did you ever get that understanding based on any conversations with people from The New York Times?

A I don't recall having that conversation.

Q Did you ever see any report from The New York Times that had Pension contributions reported in a way that was not a percent times a wage?

A No.

Q Let's talk a little bit about the

ARBITRATION - VOLUME IV

difference between the standard for the Pension Fund audit versus a payroll audit.

Can you quantify in any way what the difference is in materiality in those two different audits?

A The annual audit of The New York Times was just one of a number of contributing employers.

A payroll audit is for that employer in particular, so there was more specificity when dealing with the payroll audit than dealing with the annual audit of the Fund.

Q Let me clarify the question a little bit.

I think you testified that for the annual audit of this Pension Fund, given its size, the materiality threshold was approximately a million dollars; is that right?

A Yes.

Q Can you tell me what the materiality threshold for payroll audit of The New York Times would be with respect to

ARBITRATION - VOLUME IV

its contributions to the Pension Fund?

A We didn't use a materiality formula when we did the payroll audits. We just looked at the results of each period's test to see the results.

Q And the information you had from The New York Times was the wages and 8 percent; is that right?

A Yes.

Q Can you describe the process that you went through in conducting the payroll audit of The New York Times?

A I don't recall the specific engagement; however, we would have randomly selected a period of time, couple weeks during the period, randomly selected individuals during that period and reviewed their payroll that was paid to them, and recalculated the contribution to see if it matched what was being paid to the Fund.

Q And did the information from the Fund database play any part in a payroll audit of The Times or was your information strictly from The Times?

ARBITRATION - VOLUME IV

A We were comparing from one to the other. So the Fund records ultimately were what was being tested to. So, yes.

Q So for a payroll audit of a contributing employer -- let's talk about The New York Times in particular.

So for a payroll audit of The New York Times, you would at some point compare The Times' data and payroll information with that information that the Fund had received; is that right?

A Yes.

MR. RICHMAN: Evan, can I ask you to stop moving your head?

MR. MILLER: Sure.

MR. EATON: I can't see him.

MR. RICHMAN: But I can. I'm sitting right across from him. I see the head going up and down.

BY MR. EATON:

Q I think you explained a little bit about the process of the payroll audit.

Can you explain to me how exactly you determined whether The Times was

Page 928

ARBITRATION - VOLUME IV

contributing the proper amount when you did the payroll audit of The Times?

A We would look at the total payroll for the period. We would look to the factor, the 8 percent factor to see the multiplication. We would look to see that the number of shifts were contributed for that period. There was a maximum number of shifts per week.

We multiply and do the math and come to a number and see if that was contributed.

Q And when you say you would multiply and do the math, you would take the eligible earnings and multiply it by the rate?

A Yes.

Q And just to confirm, that rate was 8 percent; is that correct?

A Yes.

Q Did The New York Times ever conduct a self-audit, that you can recall?

A Well, I can recall them notifying the Fund office that they undercontributed at some point. If that's what you are

Page 929

ARBITRATION - VOLUME IV

referring to as a self-audit, then I guess I'm thinking they did that.

Q And you answered my next question. And the conclusion was that they had underpaid; is that right?

A Yes.

Q In your experience was it common for contributing employers to self-report to the Pension Fund that they had underpaid?

A No, that's not common.

Q Let's look at Exhibit 50.

Take a second to review that.

Mr. Lewis, have you seen this document before?

A I have, yes.

Q And just for the record, the first page has two e-mails on it and it's Bates Number WEISER-177.

The first is an e-mail from you to Ivy Narissi on August 8, 2012 at 3:03 p.m.

And the bottom e-mail is an e-mail from Morris Claffee to you on August 8, 2012 at 5:17 p.m.

Do you see that?

Page 930

ARBITRATION - VOLUME IV

A I do.

Q And let's focus on the bottom e-mail. Mr. Claffee writes, "Hello, Mitch, Per our conversation, please see above attachment for summary and details of employer Deliverers' Pension and Welfare contributions that were not funded due to setup issues. This issue was detected during self-audit of employer contributions. These have been corrected in our payroll system, and we have implemented additional controls to make sure that they are not missed going forward. Please review attachment and advise of any questions or concerns."

Do you recall receiving this e-mail from Mr. Claffee?

A I recall once I saw it, that makes sense that I would have received it. I don't remember exactly at that time, but, yes.

Q And if you flip to the next page, there appears to be a spreadsheet that's WEISER-178, Bates Number.

Page 931

ARBITRATION - VOLUME IV

I want to focus on Column B where it looks like we have deduction code, DELPEN and DELWEL.

And then in Column D, looks like we have dollar figures; is that right?

A Yes.

Q And is this sort of a summary of the results from the self-audit that The Times did?

A Yes.

Q So they ended up concluding that they for DELPEN owed approximately $62,000 and for DELWEL, approximately $62,000; is that right?

A Yes.

Q Let's look at the next page, WEISER-179.

And Column B seems to be employee names. And then I want to focus on Columns G, H and I with G being the earnings subject to deduction, H the deduction percent and I the calculated deduction.

Do you see those?

A Yes.

ARBITRATION - VOLUME IV
Q Is it your understanding that for this self-audit process, The Times went through and for the employees listed in Column B wrote their earnings subject to deduction, multiplied it by 8 percent and then remitted a check based on the result of that math?
A Yes.
Q So the remedy for the shortfall by The Times was to take earnings, multiply it by 8 percent and that was the result they needed to send you to top up for their previous shortfall; is that right?
A Yes, sent to the Fund.
Q And then if you could flip to the next payable which is WEISER-180, Column K. It's just a continuation of the previous column, but you see it says DELPEN for the deduction code?
A Yes.
Q And your understanding is that's the Pension deduction code; is that right?
A Yes.
Q Let's go later in the document and

ARBITRATION - VOLUME IV
go to WEISER-221.
Are you there?
A Yes.
Q And Column B again is employee names, and then Columns G, H and I are the same for, as we previously looked at earnings, subject to deduction, deduction percentages and calculated deduction.
And if you just flip the page briefly, you'll see in Column K, this is for DELWEL.
Do you see that?
A Yes.
Q Am I correct that The Times sort of undertook this process to make up for the shortfall by taking Column G, which is the earnings subject to deduction, multiplying it by 7.68 percent, and then the product of that calculation is what they remitted to make up for the shortfall?
A Yes.
Q Is there any mention in these calculations or this process about shifts?
A No, there's not.

ARBITRATION - VOLUME IV
Q Any mention of shift wage?
A No.
Q Any mention of shift rate?
A Not that I see.
Q And when you received this e-mail from Mr. Claffee, first, was it accompanied with a check with this or soon thereafter?
A I don't recall the timing. We did not get the check.
Q It went to the Fund?
A Right.
Q Okay.
What was your reaction when you got this e-mail?
A Surprised. It was unusual and we went -- we were asked what we should do about the -- the Fund asked what should we do about this.
Q Well, let's start with the first part.
Why were you surprised?
A It's out of the ordinary that a contributing employer would send a report like this on underreported contributions.

ARBITRATION - VOLUME IV
Q Did you discuss -- first, did you have any communication with Mr. Claffee as a result of this e-mail, that you can recall?
A I don't recall specifically but clearly says in the e-mail that we did.
Q Did you discuss this with anyone at the Pension Fund?
A Yes, we did.
Q And with whom did you discuss it?
A We would have discussed it with the Fund director and I believe one of the Fund attorneys.
Q Did you discuss this with the trustees at all?
A I don't recall having specific conversations with the trustees.
Q Do you remember if this came up at all in your trustee meetings?
A I wasn't at every meeting, so I'm not really sure. I don't recall.
Q Did you believe that The Times properly calculated the amount that they had to make up for?
A It appeared that the calculation,

ARBITRATION - VOLUME IV

based on what we saw, made sense to us in that these individuals were not included in the Fund reporting, the Fund's own internal reporting of shifts and credit and any of those things. They just were not listed.

So in that regard, being that these individuals were here paid for during this period, then it made sense to us that The Times was saying that they were in fact employees of The Times and NMDU members didn't make sense.

Q Aside from sort of people not being reported on the remittance reports, did the actual calculations make sense to you?
A They did.
Q And did you discuss the actual calculations with Mr. Schwartz?
A I don't recall specifically. I would say we probably had a conversation about it.
Q Did he ask you any questions to the effect of where is the information about shifts?
A I don't recall him saying that.

ARBITRATION - VOLUME IV

Q Do you recall him objecting in any way to The Times conducting their self-audit in this particular way?
A No.
Q You testified on your direct examination about an audit you conducted of C & S.
Do you recall that?
A Yes, I do.
Q And can you describe how that audit came about?
A I think I mentioned it earlier that C & S was closing and we were asked to review their contribution rates and payments for a period prior to their closing.
Q Let's look at Exhibit 45.
A Okay.
Q On the page that's Bates labeled FUND-1250, if you go there.
Under Paragraph B, it says, "Mr. Lewis reviewed the final results of the payroll audit of the City & Suburban Delivery Systems, Inc. as detailed in the June 14, 2010 memorandum attached hereto as

ARBITRATION - VOLUME IV

Exhibit H. As noted, a settlement payment of $343,289 was made on June 24, 2010. A copy of the check is also attached as part of Exhibit H."
So you attended this trustee meeting; is that right?
A It says I did. I must have, yes.
Q Do you recall presenting the results of your audit to the trustees?
A Yes.
Q Could you describe the trustees meeting? Set the scene for me. Who was there, where was it?
A Well, it was five years ago, so it's very difficult for me to really remember those kind of details.
Q Okay. Do the best you can.
A Trustee meetings took place at Proskauer's office. Huge conference table and everybody was sitting around it, the lawyer trustees on one side and the Union trustees on the other, and professionals intermixed, and the Fund director at the head of the table with the actuaries.

ARBITRATION - VOLUME IV

Q And when you presented information at one of these trustee meetings, do you walk up to the head of the table and stand and present, or do you just remain seated and talk to the trustees and those present?
A I remained seated.
Q Let's look at your letter, Bates labeled 1251.
And it's dated June 14, 2010. And the Subject is "Conclusion of payroll audit of City & Suburban Delivery Systems, Inc."
The first paragraph states, "As previously communicated in a report dated April 20, 2010, Weiser noted that there were three discrepancies while performing procedures to determine that City & Suburban Delivery Systems, Inc., C & S, was in compliance with the Newspaper and Mail Deliverer-Publishers Pension Fund contribution obligation pursuant to the terms of the Newspaper & Mail Deliverers Union of New York and the C & S Collective Bargaining Agreement."
Do you see that?

ARBITRATION - VOLUME IV

A I do.

Q So your task was to ensure that the contributions comported with the Collective Bargaining Agreement; is that right?

A Yes.

Q Let's look at your first finding that's at the bottom of 1251.

Tell me if I accurately summarized this: That The Times had agreed to contribute based on hours for apprentices only, but in fact they were contributing based on hours for employees other than apprentices; is that right?

A Yes.

Q And you note in the last sentence of Page 1251, "The CBA stated that only apprentices were to be paid using the hourly rate."

Is that right?

A Yes.

Q If you turn to the next page, FUND-1252.

For the results, let me direct your attention to the sentence that begins "Due

ARBITRATION - VOLUME IV

to the CBA ..."

Do you see that?

A Yes.

Q It says, "Due to the CBA, effective date of March 31, 2006, Weiser requested the recalculation of contributions for the period April 1, 2006 through December 31, 2006. Thus each period was recalculated for a total apprentice hours times hourly rate, and all regulars were recalculated multiplying total eligible earnings times applicable pension percent."

Do you see that?

A Yes.

Q I want to focus on the last half of that sentence that begins "All regulars were recalculated ..."

A Okay.

Q What do you mean by that?

A That only the apprentices, that group was based on that particular rate; that others should have been based on their work day rates.

Q Okay. So I'm trying to figure out

ARBITRATION - VOLUME IV

how The Times remedied this sort of inaccurate contribution they were making.

When it says, "Regulars were recalculated by multiplying total eligible earnings times applicable pension percent," does that mean that their earnings were multiplied by 8 percent?

A Their eligible earnings, yes, based on maximum shifts. Because they could have worked six days or seven days, they don't contribute on all of those days.

So it wouldn't necessarily have been a hundred percent of the earnings. The earnings would have been limited to five days.

Q So are total eligible earnings synonomous with wages?

A Yes.

Q So for The Times to remedy this shortfall, they took total eligible earnings and multiplied it by the applicable Pension percent.

Was the applicable Pension percent 8 percent?

ARBITRATION - VOLUME IV

A Yes.

Q I believe you testified on your direct that The Times went back and recalculated based on the shifts -- the wages earned per shift.

Do you recall that?

A I do.

Q Is it still your testimony that they looked at the type of shift worked, or did they look at total eligible earnings and multiply it by 8 percent?

A Well, the type of shifts correspond to the earnings. So they basically looked at the earnings but the earnings are comparative. That is the shift. Because the earnings are specific to a particular type of shift, so it is earnings, but it's also the type of day that the person works or night.

Q So it's your understanding that 8 percent of eligible wages or eligible earnings means the same thing as 8 percent of the shift rate that was worked?

A Yes.

Page 944

ARBITRATION - VOLUME IV
Q Is it your understanding that contributions are made based on shifts that are not worked?
A Some.
Q And what's your understanding of the types of contributions that are made based on shifts not worked?
A Vacation, sick, Workers' Comp, I believe.
Q And would military pay be another one?
A That, I don't recall. I'm sorry, I don't recall.
Q Do you know how foremen are paid? Strike that.
Do you know the basis upon which foremen get Pension contributions made on their behalf?
A I believe it was their pay times 8 percent.
Q So is it still your understanding -- strike that.
When The Times corrected their discrepancy under Finding 1, is it your

Page 945

ARBITRATION - VOLUME IV
understanding that they took 8 percent of the wages paid and also 8 percent of the nonworked shift pay, such as vacation pay and military pay and foreman salary, those things we just listed?
A Yes, except those nonworked days were I believe not restricted to just five days.
If an individual was paid for ten days of vacation, then the full contribution was made.
Q Is it your understanding that foremen were paid per shift or based on a salary?
A I don't really have a detailed knowledge of the foremen's compensation process.
Q Okay. Let's go to Paragraph B on FUND-1252.
It says, "The rate increases were made on March 31, 2008. The calculation of the hourly rate was not updated."
Do you see that?
A I do.

Page 946

ARBITRATION - VOLUME IV
Q And the results -- I want to focus your attention on the sentence that starts "For the regulars ..."
Do you see that?
A I'm sorry?
Q The sentence begins "The recalculation by The Times ..."
A Sorry. I'm off.
Q Understood. Fair enough. Let me direct you. We're under Paragraph B, paragraph that begins "Result ..."
A Yes, "The recalculation by the Fund ...," yes.
Q "The recalculation by The Times was based on regulars on total earnings. Therefore, the rate increase is automatically included in updated calculation."
So similar to our last sort of section that we discussed, is it your understanding that The Times to make up for their shortfall took total earnings and multiplied it by a percentage?
A Yes.

Page 947

ARBITRATION - VOLUME IV
Q And for Finding C, Paragraph C, the finding was that the diversion percentages were not updated, meaning diversion from the Pension Fund to the Welfare Fund; is that right?
A Yes, that's right.
Q And the remedy here was -- and let me direct you to the sentence that begins "For the regulars ..."
"For the regulars, total earnings were multiplied by 6 percent for the periods 2006, 2007 and January 2008, 6.5 percent for February 2008 through June 2008, and 7 percent for July 2008 through December 2008. No exceptions were noted."
Do you see that?
A Yes.
Q So again, The Times' remedy was wages times a percent?
A Yes.
Q In any of these findings or results, are shifts mentioned with respect to the regulars?
A There's no comment here about

ARBITRATION - VOLUME IV

shifts.

Q Is wage rate mentioned with respect to regulars anywhere?

A The term exactly "wage rate"? It says here "earnings, wages."

"Wage rate?" No, I don't see that.

Q Do you see "shift rate" anywhere?

A No.

Q And you presented these findings to the trustees; is that correct?

A Yes.

Q Did any of the trustees ask a question to the effect of: "Why doesn't it say shift rate"?

A No.

Q Did they ask any questions -- strike that.

A No.

Q Did they ask any questions about your conclusions or the results that describe the process by which The Times had to make up for the shortfall?

A No, I don't recall.

MR. EATON: Can we take about a

ARBITRATION - VOLUME IV

five-minute break.

ARBITRATOR IRVINGS: Sure.

(A brief recess was taken.)

BY MR. EATON:

Q Mr. Lewis, if I could direct your attention to Exhibit 75, please. It's in the blue binder. And specifically to Bates Number FUND-1611. It's the Schedule R for that Form 5500.

And I believe you testified on direct examination that you filled out the Schedule R; is that right?

A We did.

Q "We" meaning?

A The firm.

Q And on what basis did you fill this out?

Strike that. Let me ask a better question.

Did you review the Collective Bargaining Agreement for The Times before you filled out Section 13E?

A No.

ARBITRATION - VOLUME IV

Q Where did you get the information from to fill out Section 13E?

A It was our understanding of what the rate is for contribution.

Q All right. And is it your understanding that a base unit measure equals a contribution base unit?

A I have not used the term before. I'm not really familiar with it.

Q Used which term?

A "Base unit contribution."

Q Let's clarify.

The term used here is "base unit measure."

A Right. Okay.

Q Do you have an understanding of what that term means?

A I don't have a technical definition, no.

Q So then on what basis did you check the box "Other" and write "8 percent of daily wage rates"?

A Because we know that the contribution percentage is 8 percent and

ARBITRATION - VOLUME IV

it's based on wages related to shifts rather than hourly, weekly or unit of production.

Q So it's your understanding that the base unit measure is not shifts; is that right?

A No, I said it is. I said it's not hourly, weekly or unit or production. It's based on daily wage rates which are based on shifts.

So there's no term here that says "shifts" so I couldn't check that box.

Q Understood.

My question is: Is it your understanding that 8 percent of daily wage rates means the same thing as shifts?

A Yes.

MR. EATON: No further questions.

FURTHER DIRECT EXAMINATION BY MR. RICHMAN:

Q Let me show you Exhibit 50 -- not that I show -- can you turn to Exhibit 50?

A Okay.

Q All set?

A Yes.

ARBITRATION - VOLUME IV
Q So you see this is an e-mail that you had -- the top one is an e-mail you had with Ms. Narissi?
A Yes.
Q And we went through on cross-examination a document that is part of Exhibit 50.
And what I would like you to do is turn to page WEISER-221.
You got that?
A Yes.
Q And so what I would like to focus on, you see on the left-hand side there are numbers starting with 966 and going to 1011?
A Yes.
Q I want to focus on the Column 1003.
Do you see that?
A Yes.
MR. EATON: You are talking about Row 1003?
MR. RICHMAN: You're right, sorry.
A I knew what you meant.
Q And I'm looking at Gregory Gruol,

ARBITRATION - VOLUME IV
G-R-U-O-L.
Do you see him?
A Yes.
Q And you see that for the week 6-4-2011, I'm under D?
A Yes.
Q That would be column?
A Correct.
Q That it has 288.51.
A Yes.
Q Do you see that?
A Yes.
Q And do you know -- and that's a dollar amount, correct?
A Yes.
Q And do you know what that dollar number represents?
A His earnings.
Q Now, let me show you. I just want you to focus on the fact that your e-mail with Ms. Narissi is dated 8-8-2012.
A Yes.
Q So let's take a look at Exhibit 86. If you look at the first page of Exhibit 86,

ARBITRATION - VOLUME IV
and it's Bates Number 98.
Do you see that?
A Yes, I do.
Q And that's an e-mail from Todd Jackson at The New York Times.
Do you see that?
A I do.
Q And that is sent more than two months -- about two months earlier on June 9th -- actually, a year and two months earlier, on June 9, 2011 to Barbara at Publishers NMDU Welfare Fund.
And who is the Barbara in that?
A Barbara is a Fund employee who is involved in the bookkeeping and the accounting.
Q And this actually says "Barbara A." Do you know who Barbara A. is?
A Her last name is Albergo.
Q If you turn to -- there's not a page number but it is the third page, and you look at Mr. Gruol who is about two-thirds down the page. They're in alphabetical order.

ARBITRATION - VOLUME IV
You see him?
A Yes.
Q And you see the Base, it says "1" under the column Base. Says "1"?
A Yes.
Q Do you know what that is?
A Specifically, I don't. I think it's shifts.
Q Let me show you Exhibit 42. See if we can have all these out together.
A Yes.
Q You see exhibits -- Bates Number 2373?
A Yes, I do.
Q And you see the factor 3-31-2011?
A Yes.
Q And if you look across the Day Rate, that day rate is 288.52?
A Yes.
Q Now let's go back to Mr. Gruol in Exhibit 50.
A Okay.
Q And you see the 288.51?
A Yes.

ARBITRATION - VOLUME IV

Q Putting all these together, do you have any understanding as to what the 288.51 is?
A This is his earnings for that one -- working that one period of time which is a shift for that day rate.
MR. RICHMAN: No further questions.
MR. EATON: Just one follow-up.

FURTHER CROSS EXAMINATION BY MR. EATON:

Q If Mr. Richman hadn't picked an example that had one shift in it but multiple, could you do the math the same way if the employee worked a day shift and two night shifts, for example?
A Without having further information, it would be difficult to do.
MR. EATON: No further questions. Done for now.

(Continued on next page.)

ARBITRATION - VOLUME IV

ARBITRATOR IRVINGS: Excellent. Thank you.

(Whereupon, the proceedings were adjourned at 4:28 p.m.)

ARBITRATION - VOLUME IV

INDEX

ARBITRATION - VOLUME IV

CERTIFICATE

STATE OF NEW YORK)
: ss.
COUNTY OF NEW YORK)

I, BARBARA R. ZELTMAN, Shorthand Reporter and Notary Public, within and for the State of New York, do hereby certify:

That this transcript is a true record of the proceedings had.

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 7th day of April, 2015.

BARBARA R. ZELTMAN
Court Reporter and Notary Public

THE ARBITRATION TRIBUNALS OF THE
AMERICAN ARBITRATION ASSOCIATION

---x

In the Matter of the Arbitration between:

THE NEW YORK TIMES COMPANY,

Petitioner,

vs.

NEWSPAPER AND MAIL DELIVERERS'-PUBLISHERS'
PENSION FUND

Respondent.

---x

No. 01-14-0000-1433

PROCEEDINGS AT ARBITRATION
BEFORE MARK IRVINGS, ESQ.,
ARBITRATOR
VOLUME V

Reported by: David Henry
JOB NO. 97105

September 17, 2015
9:30 a.m.

Continued Proceedings at Arbitration (Volume V), before Mark Irvings, Esq., Arbitrator, held at the offices of the American Arbitration Association, 120 Broadway, New York, New York.

A P P E A R A N C E S:

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AND: MAX GARFIELD, ESQ.
AND: ADAM GARTNER, ESQ.

ALSO PRESENT:

ANDREW GUTTERMAN, ESQ.
The New York Times
TOM BENTVENA
ANNE KOSKI, ESQ.
The Segal Company (p.m. session)

Hayes - Direct

TERRY HAYES, recalled as a witness, having previously been duly sworn, was further examined and testified as follows:

DIRECT EXAMINATION BY MR. MILLER:

Q. Mr. Hayes, welcome back. You testified in these proceedings back in February, and we've called you back to testify specifically about the subject of what occurred at meetings of the board of trustees and to ask you about minutes from those meetings and various exhibits to those minutes. Those are the only matters we'll be asking you about today.

I'd like to start though by asking you to refresh our respective memories about certain aspects of your February testimony to lay the foundation for the new questioning.

MR. RICHMAN: Do we really need to do this?

MR. MILLER: It's just a couple of I think useful foundational questions, and I do think it will make

Hayes - Direct

the documents go more quickly.

Q. Have you recently reviewed your February testimony?

A. Yes, I have.

Q. And what was your testimony about your understanding between 2008 and the time that the Fund assessed partial withdrawal liability in September, 2013 about the relevant measure for the 70 percent decline test for partial withdrawal liability?

A. Yes, during that period of time the measurement was a percentage of wages.

Q. Okay, alright, with those preliminaries, the documents we'll discuss this morning are contained in the yellow binder, so why don't you open that now. Let me turn your attention initially to Exhibit 125. And Mr. Hayes, can you briefly summarize and identify these materials?

A. The first page is the agenda that lists the items that are going to be discussed at the meeting. The page after

Hayes - Direct

that are the actual minutes from that meeting.

Q. And that meeting took place on July 25, 2007, is that right?

A. That's correct.

Q. Why don't you turn your attention to the first page of the agenda and the first item on the agenda that day, and why don't you explain quickly what that first item is.

A. Yeah, the first item basically announces me as a new publisher trustee replacing Bob Nusspickel, who was the previous trustee for the publishers.

Q. So was this your first meeting of the board of trustees for the NMDU Fund?

A. Yes, it was.

Q. Now let's turn to the exhibit to these minutes which I believe begins at page 3311, that's on the bottom right. It's also called Exhibit I to the minutes.

A. Yes.

Q. Take a look at the exhibit to these minutes for a moment.

Hayes - Direct

A. Okay.

Q. I'm not going to ask you any specific questions about the letter. Just generally for foundational purposes, why don't you tell us what this letter is about.

A. This letter was from Segal who was the actuary for the Fund explaining to us that due to the new rules associated with the Pension Protection Act, that there were going to be changes in funding.

Q. And during your service on the board of trustees, how much attention did the board pay to the Pension Protection Act and its rules?

A. We paid a lot of attention to that. It was brand new and legislation was occurring as time went on.

Q. And roughly how many meetings did the board have over the course of years in which it discussed Pension Protection Act issues?

A. We discussed it at virtually every meeting and there are special

Hayes - Direct

meetings in which we had discussions about it.

Q. During your time on the board of trustees, how would you compare the time that the trustee spent on Pension Protection Act matters versus the time the board spent on withdrawal liability matters?

A. We spent a lot of time on the Pension Protection Act and virtually no time on withdrawal liability.

Q. And in connection with Pension Protection Act matters, who guided the trustees with respect to those matters?

A. Segal was the actuary through John Urbank and Rosana.

Q. And Rosana?

A. Egan, sorry.

Q. And of the time that the trustees spent at its meetings hearing from Segal, roughly what percentage would you estimate related to Segal advising about Pension Protection Act issues?

A. Most of Segal's updates to us

Hayes - Direct

really revolved around the Pension Protection Act, you know, funding improvement plans, the zoning and how the zones were calculated and identified. So we spent a lot of time with them on that.

Q. Okay, why don't you turn your attention now to Exhibit 126, which are meeting of materials and minutes for September 20, 2007 board meeting.

A. Yes, I see that.

Q. And why don't you take a look at the first page of those minutes, which is 3086, again September 20, 2007.

A. I have it.

Q. Mr. Hayes, do you remember attending this meeting on September 20, 2007?

A. While I don't specifically remember attending, it says I was here. I have no reason to think that I wasn't.

Q. Alright, let me draw your attention to page five of the minutes. It's on 3090.

A. Yes, sir.

Hayes - Direct
Q. And at the top of page 5 there is a bullet point that talks about Pension Fund diversion of two percent being reduced to one percent. Do you see that?
A. Yes, I do.
Q. And there is a similar reference to diversion in a bullet that's right under this little redacted box. Do you see that as well?
A. Yes, I do.
Q. And then on the next page, page 6, there is also mention of diversion in paragraph four as part of a trustee motion. Do you see that?
A. Yes, I do.
Q. What is your understanding of the Pension Fund diversion?
A. The Pension Fund diversion occurred before I joined the trustee board, but it was the diversion of up to two percent of the wages associated with the Pension Fund contribution that was available for the union to divert to the Welfare Fund.

Hayes - Direct
Q. And so in connection with the references to a 2 percent and a 1 percent and a 1.5 percent on page 5, what are those percentages of?
A. Those are percentages of wages.
Q. During your time on the board of trustees, did the subject of pension contribution diversions frequently come up?
A. Yes.
Q. And when the issue of diversions were discussed, how were the diversion amounts typically expressed?
A. The diversion amounts were typically expressed in dollars and wages.
Q. Let me draw your attention back to page 5 of the minutes, and there is a bullet right about the middle of the page that begins, if the sixers' contributions, do you see that?
A. Yes, I do.
Q. And you see at the end of, or the second half of that sentence in the bullet point, it talks about guaranties to the Welfare Fund through a possible increase in

Hayes - Direct
the employees' shift contribution, do you see that?
A. Yes, I do.
Q. So that does mention shift contributions. What is that a reference to?
A. That is a reference to the employees' per shift contribution to the Welfare Fund.
Q. Alright, let's turn our attention now to Exhibit 127. And those are agenda meeting materials for a December 19, 2007 meeting.
A. Yes, I see that.
Q. Okay. And let's begin drawing your attention to page 1 and the discussion of who was present.
A. I see that.
Q. And did you attend this meeting?
A. Again, I don't have a specific recollection, but the minutes state I was there so there's no reason for me to think I wasn't.
Q. And now let's turn to page 2 of

Hayes - Direct
the minutes, that's Fund number 3094, and toward the middle of the page there is a discussion that begins under the heading Consultants' Report, do you see that?
A. Yes, I do.
Q. And the consultants in this regard would be whom?
A. That would be Mr. Urbank and Ms. Egan.
Q. Let me draw your attention specifically to a sentence just about in the middle of that paragraph. It begins with the word contributions, contributions for the year beginning. Why don't you read that sentence to yourself.
A. Yes, sir.
Q. And there is a reference in that sentence to projected contributions, quote, reflecting the contribution reallocation to the Welfare Fund being reduced from 2 percent to 1.5 percent, do you see that?
A. Yes, I do.
Q. And is that a continuation of the discussion on diversion and reallocation

Hayes - Direct
from the prior meeting that we just discussed?
A. Yes, it is.
Q. And that contribution reallocation that's discussed in this paragraph, the references to percentages, those are again a percentage of what?
A. Percentage of wages.
Q. All right, let's move to the next page, page three. And why don't you quickly if you can review the first two paragraphs.
A. Yes, sir.
Q. Okay, and you'll see in those paragraphs that there is a mention of zone certification, and I think you mentioned a couple of moments ago in your testimony about zone certifications.
Did you participate at board meetings in which Segal would discuss the need to have zone certifications?
A. Yes.
Q. And how often would those board meetings occur?

Hayes - Direct
A. We talked about the zones ad nauseam during the period of time.
Q. So often?
A. Yes, very often.
Q. And did Segal propose to help the trustees project what zone the fund would be in in the future?
MR. RICHMAN: Can we not lead?
THE ARBITRATOR: I mean, I've let you lead the whole time, but at some point --
MR. MILLER: I understand.
Q. Did there come a time in which Segal made proposals to the trustees in connection with certain services relating to the Pension Protection Act?
A. Yes, they did.
Q. And what do you remember the nature of those proposals to be?
A. Mr. Urbank had suggested to us that we may hire them to do an asset liability modelling study.
Q. And did the trustees approve Segal going ahead with such a study?

Hayes - Direct
A. Yes, we did.
Q. And in fact was that work performed and presented to the trustee?
A. Yes, it was.
Q. Okay, let's turn to Exhibit 128, which are meeting materials from April 17, 2008.
A. Yes, I have it.
Q. And again, please take a look at the first page of the minutes and the discussion of the trustees who were present.
A. Yes, I have it.
Q. Did you attend this meeting?
A. Again, I don't have any specific recollection, but it says I was there, so I was there.
Q. Okay, now I want to draw your attention to one of the exhibits to these minutes. It's Exhibit C, which begins on page 3319, about seven pages in to Exhibit 128. It's an April 17, 2008 memo from Urbank and Egan to the board.
A. Yes, I have it.

Hayes - Direct
Q. Do you see that?
A. Yes, I do.
Q. And the memo is entitled Pension Protection Act of 2006, information requirements for zone certification. Take a moment to review this memo.
A. Yes.
Q. Do you recall seeing this particular memo at a board of trustees meeting?
A. Not this particular memo, but we had memos like this throughout the period because the zones were done annually, so.
Q. Please take a look at page 2 of the memo under the heading projected industry activity.
A. Yes, sir.
Q. And please take a note of the last sentence in that paragraph, and particularly the last line of that sentence.
A. Yes, sir.
Q. That last line indicates that Segal needs an assumption about, quote,

Hayes - Direct
expected wage increases in future years, since contributions are a percentage of wages. Although I understand you don't recall this particular document, let me ask you this question. Do you recall seeing documents in which Segal referred to Fund contributions as a percentage of wages?
A. Yes.
Q. Do you recall Segal representatives who attended trustee meetings describing the Pension Fund's contributions as a percentage of wages?
MR. RICHMAN: Objection. Come on, all we're doing here is reading documents. I mean, what are we doing? And the questions are leading besides that. We have said repeatedly, and all you have to do is read the documents to say they say percentage of wages. The documents tell us that, right? I don't understand what we're doing here.
MR. MILLER: Well, first, obviously terminology and the

Hayes - Direct
practices that were engaged in by the advisors to the Fund and the terminology that was used at trustee meetings is very important to the determination of what contribution base units are. Moreover, while the documents do speak for themselves, I'm trying once I lay the foundation and have the witness acknowledge what the document is saying to go on to ask questions about the terminology and how it may have been discussed. That's exactly the last question that I asked.
THE ARBITRATOR: Well, certainly the last question you asked we can have. I don't think it's necessary to go through and have him point to each thing. I'm sure you'll do that with precision in your brief.
Q. Alright, so may I turn back to the last question. Do you recall Segal representatives who attended trustee meetings describing the Pension Fund's

Hayes - Direct
contribution?
MR. RICHMAN: Objection, that's leading.
THE ARBITRATOR: I agree.
Q. Fair enough. Do you recall attending trustee meetings in which there were descriptions of --
MR. RICHMAN: Objection.
THE ARBITRATOR: He can finish this. Were there descriptions and what were they.
MR. MILLER: Yes, that's right.
Q. Were descriptions of the contributions discussed at trustee meetings?
A. Yes.
Q. And what were they?
A. It was discussed as contributions being a percentage of wages.
Q. And that terminology that was discussed at these meetings, contributions being a percentage of wages, was that consistent with your understanding of how contributions to the Fund are made?

Hayes - Direct
A. It was consistent.
Q. Did use of this terminology influence your understanding of the contribution formula?
MR. RICHMAN: Objection.
THE ARBITRATOR: You're arguing now.
Q. Alright, let's turn to Exhibit 131. And again, I draw your attention to the first page of the minutes and its discussion of what trustees were present, and why don't you advise as to whether you attended this meeting.
A. Again, I have no specific recollection. The minutes said I was here. I don't doubt that I was there.
Q. Alright, let's turn your attention to page 6 of the minutes, and the discussion on that page under the heading Segal Company Report.
A. Yes, I see that.
Q. And you'll notice that part way down the page, the minutes indicate that the trustees adopted a motion authorizing

Hayes - Direct

Segal to use certain assumptions in connection with their zone certification work. Do you see that?

A. Yes, I do.

Q. Do you recall the board of trustees authorizing Segal to make certain assumptions in connection with PPA zone certifications?

A. Yes.

Q. In connection with that, did the trustees ever authorize or adopt assumptions about future shifts for Segal to use in connection with zone certifications?

MR. RICHMAN: Objection, it's leading.

THE ARBITRATOR: Sustained.

Q. Alright, let's move on to Exhibit 136. Same initial question, take a look at page 1. It should be the same answer sir, no reason to believe you were not at the reason?

A. Exactly.

THE ARBITRATOR: Maybe if we

Hayes - Direct

get to the point where you do recall meeting at a meeting, you can tell us.

Q. Why don't you look at section 10 of the minutes that begin on page 4, in paragraph B.

A. Yes.

Q. And in reviewing paragraph B, you'll see that toward the end of that page, there is a discussion in which there are a number of bullet point items relating to an apparent request that the trustees made of the Segal representatives in connection with their projections. Why don't you review those for a moment.

A. Okay.

Q. Let's focus on the second to last bullet at the bottom of the page 5, where there is a discussion again of reallocation and Welfare Fund contributions. Do you see that language?

A. Yes, I do.

Q. And there is a mention in that language of Welfare Fund offset contributions based on shift rate

Hayes - Direct

contributions, do you see that?

A. Yes, I do.

Q. I think you testified a couple of minutes ago that you attended board meetings in which the subject of pension diversion was discussed?

A. Yes.

Q. And did you also attend board meetings at which the subject of reallocation of monies from the Welfare Fund back to the Pension Fund, was that discussed?

A. Yes.

Q. And what do you recall about those discussions relating to reallocation at these meetings?

A. At this meeting we were discussing because of the condition of the zone reallocating the diversion money that had been going from pension to welfare back from welfare to pension to help with that zone clarification, and then there was a discussion about how do we get money back into the Welfare Fund since we were moving

Hayes - Direct

the money, and the discussion here talked about having that loss, if you will, covered by an increase in the shift rate and what they're talking about here is, as I said before, employees pay for welfare. Employees pay a set amount of dollars per shift into the Welfare Fund. So this talks about increasing that per shift contribution.

THE ARBITRATOR: Did you say employees?

A. Employees. So this talks about increasing that contribution for employees, or doing a modification to their benefits, or maybe a little of both.

Q. Alright, now let's turn to Exhibit 137. And I'd like to draw your attention to the first page under the heading discussion of funding improvement plan.

A. Yes, sir.

Q. Okay. Do you recall attending trustee meetings in which funding improvement plans were discussed by the

Page 985

Hayes - Direct
trustees?
A. Yes, sir.
Q. At the bottom of the next page, page 2, in the last paragraph, there is a discussion of Segal representatives conducting an interactive presentation. Do you see that?
A. Yes, I do.
Q. Do you remember attending a board of trustees meeting in which there were interactive presentations from Segal?
A. I remember attending a meeting where there was an interactive presentation.
Q. And can you describe generally what occurred during the course of that presentation?
A. Yes. Ms. Egan and Mr. Urbank brought with them one of the people from their firm that came in with this interactive program. We were at Proskauer at the time and they were able to project this program on to a screen where you could actually see them make manipulations to

Page 986

Hayes - Direct
certain areas that would then calculate out where our zone would be over 10 years, 20 years, that sort of thing.
Q. Okay, and at these interactive sessions or at this interactive session, did Segal model future contribution amounts?
A. Yes, they did.
Q. And what do you recall about the method and terminology they used in connection with modelling future contribution methods?
A. The modelling of the future contributions were basically a change in the rate, the rate being a percentage, so they were looking at move the percentage of the wages from 8 percent to 10 percent or from 8 percent to 11 percent or some type of combination until they were able to get the funding up into the zone, the green zone, and how long it would stay green until we had to do something else.
Q. Now let's take a look at the exhibit to these minutes, it's only one I

Page 987

Hayes - Direct
believe, and I believe it's not labelled as such, but it begins at Fund 3366.
A. Yes, I see that.
Q. Take a moment to look at that exhibit.
A. Yes.
Q. What is this document? Do you recall this document?
A. This is the document that was distributed by Segal talking about the funding improvement plan. This is again, as I was talking about, those different movements and adjustments you could make to the plan, are contributions to the Fund that would drive different scenarios of our funding zones.
Q. Did you discuss this document or versions of this document at any board of trustees meetings?
A. Yes, we did.
Q. And was that discussion in addition to the interactive modelling you just testified about?
A. Yes. In fact as I said, I

Page 988

Hayes - Direct
remember one interactive meeting, but then there were a host of meetings that went on after that where we basically talked through what we had seen on the board, and we made suggestions sometimes of, if you change this, what would occur.
Q. And I want you to focus again on this slide deck. And do you recall a meeting or multiple meetings in which you discussed this slide deck or versions of it?
A. Yes.
Q. Can you take a look at the slide labelled -- it's really page 4 of the deck, Fund 3370.
A. Yes, I see that.
Q. And why don't you focus on the heading at the top, possible FIP.
A. Yes.
Q. And it uses the phrase 8 percent CR. What is your understanding of what CR meant?
A. Contribution rate.
Q. During the course of the

Hayes - Direct

discussion of this document, was there any discussion of what that 8 percent of CR was, or was of?

A. Yes. As I stated before, it was a percentage of wages.

Q. And now let's focus, going ahead to page or slide deck page 12, which is Fund 3378. And you'll see that there is a mention of scenarios and scenarios 2 and 3. It uses that same term methodology. And did you have the same, similar discussion respecting what that terminology meant in these meetings?

A. Yes, it was very clear.

Q. Alright, let's turn to Exhibit 138.

A. Yes, sir.

Q. In fact let's move ahead to Exhibit 140. October 11, 2011.

A. Yes, sir.

Q. And again on the first page it indicates that you were present. I want you to draw your attention to page 4 of the minutes, and the discussion under the

Hayes - Direct

heading 8, which is entitled Segal Company Report. Why don't you take a moment and review the discussion under VIII(A).

A. Yes, sir, I see that.

Q. Do you remember this discussion about El Diario at any board of trustee meeting?

A. I do not recall that, no.

Q. Do you have a view as to why you don't remember a board meeting at which El Diario was discussed?

THE ARBITRATOR: He didn't say that.

Q. Do you have a view as to why you do not remember attending a board of trustee meeting in which -- board of trustee meeting discussing Diario?

A. Yes, I do have a thought about that.

Q. And why don't you explain.

A. In preparation for my testimony, because I had not really seen this and focused on this, I went back to check my calendar to see what was happening that

Hayes - Direct

day. And as it turned out I was double booked for meetings that day. So I may have missed this because I departed this meeting early so I could get back to a meeting at headquarters.

Q. And when you reviewed your calendar, what did it show about the timing of that other meeting?

A. It showed that I had to be back at headquarters for a meeting that I was leading that began at 1:00 o'clock.

Q. And did you attend that 1:00 o'clock meeting that was shown on your calendar?

A. Yes, I absolutely attended that meeting.

Q. And why do you have that level of confidence?

A. I went so far as to contact the attendees at that meeting to make sure that their notes would reflect that I was at that meeting. They checked those notes and I was absolutely there.

Q. This meeting that you attended

Hayes - Direct

back at headquarters, was it a meeting of consequence for you?

A. It was a very important meeting. The Times was looking at doing a reduction in force, in its staffing, so it was a very important meeting.

Q. Why don't you turn to page 1 of the minutes.

A. Yes, sir.

Q. And what does that say about when the trustee meeting began?

A. The meeting began at 10:30.

Q. And page 6 of the minutes indicates when the meeting was adjourned. Can you take a look at that.

A. Page 6 indicates that it was adjourned at two, 2:00 p.m.

Q. Based on all this, what is your understanding of how long you attended the meeting on October 11, 2011?

A. I left that meeting an hour and a half or more before it was over, based on the times.

Q. Now let's turn to Exhibit 141.

Hayes - Direct

A. Yes, sir.

Q. And focus on the first page which is the agenda page, and focus on the first item of the agenda for that day. Do you see what that is?

A. Yes, I do.

Q. So that relates to adoption of minutes of, among other things, the October 11th meeting?

A. Yes.

Q. As far as you know, did you attend this meeting on December 9th?

A. Same as before, I'm listed as being there. I have no reason to believe I wasn't.

Q. When minutes of this Fund's trustees are formally adopted, are they executed?

A. They're executed at the meeting, yes.

THE ARBITRATOR: I'm not sure I know what you mean by executed.

Q. Are the minutes signed?

A. They're signed at the meeting.

Hayes - Direct

Q. And who signs -- what is the protocol for signing the minutes of this Fund's trustee meeting?

A. The minutes will be signed by one union trustee and one publisher trustee.

Q. Let's go back to the minutes of October 11, 2011. And the signatures on those minutes are on page 6.

A. Yes, sir.

Q. It's Fund 3178. And you'll note the employer trustee signature. Is that your signature?

A. No, it's not.

Q. Whose signature is that?

A. That's Dan Murphy's signature.

Q. Who is he?

A. He was my partner trustee on the publisher side.

Q. Even on occasions where you did not sign minutes, was it your practice to review draft minutes before being adopted?

A. Normally yes.

Q. And when would you do that?

A. They would send the minutes out

Hayes - Direct

to us and we would review those minutes and make comments before we would meet at the meeting where they would be adopted.

Q. And did you follow that practice here and review on or before December 9th the minutes from October 11, 2011?

A. I do not recall reviewing those minutes. As I stated earlier, we were going through a reduction in force and this December time frame, November, December time frame was when we were actually letting the people go. We had run the process and we were actually letting them go during this period. So I was diverted and I didn't follow my usual protocol apparently.

Q. Alright, let's turn to Exhibit 143, which are minutes of February 27, 2013.

A. Yes, sir.

Q. And why don't you draw your attention to just the first heading which is Roman one, call to order, take a quick look at that discussion. And as far as you

Hayes - Direct

are aware, what was the purpose of this meeting in the winter of 2013?

A. This was a special meeting to discuss the funding improvement plan.

Q. Can you turn to page 3 of the minutes under a heading entitled B, four scenarios.

A. Yes.

Q. And why don't you take a moment to review the discussion in B, and particularly the itemized projections of that are at the bottom of that page and the top of the next page.

A. Yes, sir.

Q. Do you remember attending a meeting in which Segal discussed projections for a funding improvement plan set of schedules?

A. Yes.

Q. And you'll see in the discussion at the bottom of that page Segal indicating projections and particularly two alternatives which referred to percentages of wages being changed in connection with

Page 997

Hayes - Direct

the contribution rate to this Fund. Do you see that?

A. I do.

Q. Do you recall whether in the presentation that Segal made relating to proposed schedules for funding improvement plans, Segal orally describing the Fund's contribution rates in a manner similar to what is described in this --

MR. RICHMAN: Objection; come on.

THE ARBITRATOR: You're slipping.

Q. Do you recall Segal describing the employer contribution rate for the pension plan in connection with any of the meetings which discussed funding improvement plan schedules?

A. Yes, sir.

Q. And what do you recall about how they characterized the contribution?

A. They were always characterized as a percentage of wages and the percentages were adjusted that would drive a different

Page 998

Hayes - Direct

net contribution.

Q. Alright, I now want to turn your attention to page 5 of the minutes. That's the last page.

A. Yes, sir.

Q. And the discussion under heading C, selection of schedules for the FIP, discusses the trustee determination. But I want you to focus on the second paragraph, and why don't you read that to yourself for a moment. And that second paragraph talks about the union adopting an alternative schedule which was part of the funding improvement plan.

Let me ask you, do you know how union employees and officials are compensated?

A. They're salaried.

Q. And do union officials get paid based on shifts worked?

A. No.

Q. Does the union make contributions to the NMDU Fund?

A. As far as I know, yes.

Page 999

Hayes - Direct

Q. Now let's turn to Exhibit 150.

A. Yes, sir.

Q. These are minutes to a board meeting on June 20, 2014.

A. Yes, sir.

Q. And let's not focus on the actual minutes themselves, but rather one of the attachments in Exhibit A, that's on 3437.

A. Yes, sir.

Q. It's an April 4, 2014 memo from Egan and Urbank to the board. Can you please review this memo and -- you only need to review the first paragraph.

A. Okay. Yes, sir.

Q. And you'll note in the middle of the paragraph, there is a sentence that begins with the word assuming and it describes the contribution rate as potentially increasing from 8 percent to 11.8 percent of the shift rate, do you see that?

A. Yes, I do.

Q. Did you see this memo at the time of the meeting?

Page 1000

Hayes - Direct

A. I'm sure I did.

Q. In all of the meetings over the years in which Segal had discussed the Pension Protection Act and funding improvement plans, do you recall the Segal representatives ever using this terminology to describe the contributions?

MR. RICHMAN: Objection.

THE ARBITRATOR: What's the objection?

MR. RICHMAN: Leading.

MR. MILLER: I don't think it is.

THE ARBITRATOR: You can have that. Go ahead.

A. No.

Q. Does The New York Times make contributions to the NMDU Fund on the basis of a percentage of shift rates times number of shifts or on the basis of a percentage of wages?

A. Our contribution is made on a percentage of wages.

MR. MILLER: No additional

Hayes - Cross
questions at this time.
(Recess taken: 10:24-10:59 a.m.)
CROSS-EXAMINATION BY MR. RICHMAN:
Q. Mr. Hayes, you testified previously that on July 25, 2007 you became a trustee. Do you remember that?
A. Yes.
Q. So that was your first meeting. And what I'd like you to take a look at is Exhibit 127.
A. Yes, sir.
Q. You did attend that meeting, correct?
A. Yes, I have no reason to think I didn't.
Q. Okay, but you have no real recollection of attending that meeting?
A. No specific recollection.
Q. Okay. And as I understand your testimony, and correct me if I'm wrong -- let me rephrase that. Do you have a specific recollection of attending any meeting of the Fund?
A. I remember the meeting where we

Hayes - Cross
had the interactive program. I remember that very clearly.
Q. And what date was that?
A. I don't remember the date, but I remember the meeting itself very clearly.
Q. And how long was that meeting?
A. That meeting lasted probably four hours.
Q. How long was the Segal report?
A. It was all Segal. There was nothing else happening.
Q. And do you remember the month that meeting occurred in?
A. No.
Q. Do you remember the year?
A. No.
Q. So if you take a look at Exhibit 127, let's look at the agenda which is 3450. Do you see that?
A. Yes.
Q. And if you look at 6 on the agenda, Weiser, LLP, do you know who those folks are?
A. Yes.

Hayes - Cross
Q. Who are they?
A. Those are the accountants.
Q. Are they still the accountants to the Fund?
A. No.
Q. When did they stop being the accountants to the Fund?
A. I don't recall specifically. I believe it was around the time when we transitioned from a Fund office to a TPA type setup, Costello Accounting.
Q. Okay, when was that?
A. Costello began to take control in February.
Q. Of what year?
A. Of 14 I believe.
Q. And you said I believe, is that because you're not sure?
A. No, that's not it. There was some transition problems from the Fund office to Mr. Costello, so he was actually doing work. So I don't know when we officially made him the accountant.
Q. So in Exhibit 127, let's take a

Hayes - Cross
look at page 5. And what I'm looking at is the Weiser, LLP report, if you could take a look at that, please.
A. Yes.
Q. Do you remember that occurring?
A. I remember Mr. Lewis being at meetings. I don't remember this discussion specifically.
Q. What do you recall Mr. Lewis doing at meetings?
A. Most of the time Mr. Lewis's presentations were very short and he only hit highlights. He basically passed out a book and he would hit the highlights of the book, if there were any, and then he was gone.
Q. Alright, a book, what do you mean by a book?
A. He gives a report.
Q. A report, and what was that report?
A. It was his financial report.
Q. Okay, and did you read that financial report?

Hayes - Cross

A. Not at the meeting. I may have reviewed some of them after, but not at the meeting, no.

Q. You may review some of them after?

A. Yes.

Q. Have you ever reviewed a financial report of the Pension Fund?

A. Yes.

Q. Yes, okay. And you do understand that financial reports have footnotes, or notes?

A. Yes.

Q. I'm sorry, I forget, what is your position at the New York Times?

A. I'm Senior Vice-President of Operations and Labor.

Q. And you read financial reports before?

A. Yes.

Q. Okay. Let's take a look at -- oh, I'm sorry, did any of the Fund professionals, and by that I mean any of the lawyers, of which there were many, ever

Hayes - Cross

report to you that the Fund's financial reports were incorrect?

A. Incorrect?

Q. Incorrect.

A. No.

Q. And did any of them ever report to you that they contained information that was not correct?

A. No.

Q. And I know I mentioned Fund counsel in that. One of those Fund counsel was Mr. Schelberg?

A. Yes.

Q. That's from Proskauer?

A. Yes.

Q. And that's the same firm that The New York Times uses at times for labor relations purposes, correct?

A. Yes.

Q. And did any of the Segal folks ever report to you that the Fund's financial reports prepared by the Weiser firm were incorrect?

A. No.

Hayes - Cross

Q. Did Murray Schwartz report to you that any of the financial reports the Weiser firm prepared were incorrect?

A. No.

Q. Did any of the trustees that you served with ever report to you that any of the financial reports of the Fund were incorrect?

A. Not that I recall.

Q. Well, you say not that you recall. If someone had reported that to you, would you have done something?

A. Oh, yes. I think them as a trustee, they would have done something.

MR. MILLER: Mr. Arbitrator, I'm going to object at this point. When Mr. Hayes previously testified, there was an opportunity by Mr. Richman at that juncture to question him about financial reports. This line of questioning goes beyond the direct testimony of Mr. Hayes earlier today, because it is not limited to the supplemental documents that we

Hayes - Cross

received during the course of this hearing.

MR. RICHMAN: I call him as a witness. Do you want me to call him as a witness? This was somebody I was never permitted to depose, and when that decision was made, the ruling was there's going to be no deposition, he was going to testify about a very small area, which he went beyond the first time this year, which was really not about how the Fund operated, but how The New York Times operated and saw its contribution obligation to the Fund. And in that ruling you said I would have, given that there was no deposition permitted, a wide latitude. And there are minutes here that have been produced that have various financial reports in them, and I do want to go through those.

THE ARBITRATOR: Pertaining to what subject?

MR. RICHMAN: Well, there are

Hayes - Cross

notes that say very specifically what the contribution based unit is for the Fund's employers. And I understand why The New York Times doesn't want to get into this, but this happened repeatedly at meetings on an annual basis.

THE ARBITRATOR: Discussions at the meetings?

MR. RICHMAN: Yes.

THE ARBITRATOR: Do you want to respond?

MR. MILLER: Yes. To the extent that those financial reports were available to Mr. Richman during the first time that Mr. Hayes appeared, he had every license at that juncture to use those financial reports. And indeed yes he did, and that was the opportunity to examine Mr. Hayes about what those financial reports said and whether Mr. Hayes had reviewed those reports.

MR. RICHMAN: We didn't have

Hayes - Cross

the minutes.

MR. MILLER: And there is no reason as a consequence that he should be given a second bite at the apple. He was not prohibited during that first time around from using those reports for the very purpose he's currently attempting to use them.

THE ARBITRATOR: You can examine what was discussed at the meetings to the extent that it goes to his understanding of what the terms were.

MR. RICHMAN: I'm going to take a little break, and maybe I can shorten this.

(Recess taken: 11:12-11:16 a.m.)

CONTINUED CROSS-EXAMINATION BY MR. RICHMAN:

Q. So let's take a look at Exhibit 131. And were you present at this meeting?

A. I have no reason to think I wasn't.

Q. Do you have a recollection of

Hayes - Cross

this meeting?

A. Not specifically.

Q. Do you remember if anything occurred at this meeting?

A. Not specifically.

Q. And let's take a look at the agenda, and on it you see, and that's the first page of Exhibit 131, do you see that?

A. Yes, I do.

Q. And 5, Weiser LP re financial statements, do you see that?

A. Yes, I do.

Q. And let's go to part of the meeting where that's discussed, which is at page 4 of the minutes.

A. Yes, sir.

Q. Okay, and it says Mitch Lewis provided -- do you see where I'm reading from?

A. Yes.

Q. Mr. Lewis provided and reviewed with the trustees the final financial statements for the fiscal years ended May 31, 2008 and May 31, 2007. Do you see

Hayes - Cross

that?

A. Yes.

Q. And do you recall Mr. Lewis doing that?

A. As I said, Mr. Lewis's reports were pretty succinct, so I'm sure he did.

Q. Okay, but I asked you a question not about the nature of his reports, but I asked if you recall that he did that.

A. I have no specific recollection.

Q. But you have no doubt that he did?

A. I have no doubt that he did his usual quick report.

Q. Okay, and how long was his quick report?

A. Usually less than five minutes.

Q. And did you ever ask him any questions about any of the financial reports?

A. Not that I specifically remember.

Q. Okay, do you remember other people asking questions about the financial reports?

Hayes - Cross

A. Not that I specifically remember.
Q. Okay, let's go to 134. And were you at this meeting?
A. There is no reason for me to think I wasn't.
Q. And you see on the agenda the Weiser report?
A. Yes.
Q. Okay, and let's turn to page 4 of the minutes.
A. Yes.
Q. And do you remember Mr. Lewis distributing and reviewing the financial reports for 2009 and 2008?
A. I have no specific memory of it, but that's his usual practice.
Q. Okay, and do you remember anybody raising any questions about the reports?
A. Not specifically.
Q. Okay, when Mr. Lewis gives his reports, who is in attendance?
A. The trustees are there, the lawyers of course, Mr. Schwartz, and sometimes some of the other people that we

Hayes - Cross

use for finances and that sort of thing.
Q. Okay, does anyone get excluded from the room when Mr. Weiser -- when Mr. Lewis gives his reports?
A. Not usually.
Q. So let's take a look at Exhibit 140, please.
A. Yes, sir.
Q. And you were present at this meeting?
A. Yes, I was present for a portion of the meeting.
Q. For a portion of the meeting?
A. Yes.
Q. And this is the meeting that you left early?
A. Yes.
Q. By the way, where is your office in relation to Proskauer's office?
A. It's across the street.
Q. Across the street?
A. Yes.
Q. And what street is that crossing?
A. It's across 41st Street.

Hayes - Cross

Q. When you see the -- on page 3 of the minutes, there is a WeiserMazars report, do you see that?
A. Yes.
Q. And do you have any reason to doubt that was given at that meeting?
A. I have no doubt that it was.
Q. Do you have any recollection of that report being given at the meeting?
A. No.
Q. Let's go to Exhibit 142. Were you in attendance at this meeting?
A. Yes, I have no reason to think I wasn't on the list.
Q. Okay, and so if you look on the agenda, you see the WeiserMazars report?
A. Yes.
Q. And that's for fiscal years May 31, 2010 and May 31, 2011, do you see that?
A. Yes.
Q. Alright, let's turn to the -- page 4 of the report.
A. Page 4 of the minutes.
Q. Of the minutes, I'm sorry, thank

Hayes - Cross

you. And so you see the WeiserMazars report?
A. Yes.
Q. Now, this description is a little bit different than the description that we've seen in the previous minutes about Mr. Lewis's report. This one says Mr. Lewis distributed and reviewed in detail the final statements. Do you see that?
A. I see that.
Q. Do you have any reason to believe that that's not accurate?
A. It wasn't usually his practice to do detailed anything.
Q. That wasn't the question I asked you?
A. What was the question?
Q. I said do you have any reason to believe that the minutes are inaccurate?
A. I don't recall him doing a detailed meeting.
Q. So do you think that the minutes are inaccurate?

Hayes - Cross

A. Possibly.

Q. Possibly. But other than you don't recall, you don't have any other reason to believe that these minutes are inaccurate?

A. Except it wasn't the practice of Mr. Lewis to give us more than a five-minute run-through.

Q. Okay, now, you indicated at the end of your testimony today that the contribution that The Times made to the Pension Fund was a percentage of wages, is that correct?

A. Yes.

Q. And that's what you believe the contribution to be, a percentage of wages?

A. Yes.

Q. And that percentage changed over time, didn't it?

A. It changed with the diversion, yes.

Q. But in your mind the contribution obligation was a percentage of wages?

A. Yes.

Hayes - Cross

Q. Okay. Was overtime included?

A. I don't do the calculation, so I can't tell you the elements.

Q. Do you know how many shifts The Times pays for when contributing to the Pension Fund?

A. As I say, we contributed based on a percentage of wages. Shifts are -- I don't even know what that means when it comes to contribution to the pension.

Q. Do you know what a shift is?

A. I know what a shift is.

Q. You do, okay. Do you know --

A. But it has no relationship to our requirement to make a contribution to the Pension Fund.

Q. It has no relationship to that?

A. No.

Q. Did you ever read the collective bargaining agreement between The Times and the NMDU?

MR. MILLER: Objection, asked and answered.

THE ARBITRATOR: I know. The

Hayes - Cross

problem is your last question to him opened this whole thing up. If you'll agree to strike the last question and answer, I'll cut this off and rely on what we went through the first day.

MR. RICHMAN: I don't understand how you can do that.

MR. MILLER: I'm prepared to do that. We'll strike it.

MR. RICHMAN: He has made a statement and he has not only -- if you're going to strike his entire testimony, I'll back off. But if the -- and I'm happy to have the testimony about El Diario stay. I want that to stay. I definitely want that to stay. But everything else with respect to percentage of contribution rate is a percentage of wages, that's on the board?

THE ARBITRATOR: Fair enough. The issue is though, is this going to be different than what we went through on his first day?

Hayes - Cross

MR. RICHMAN: I think so, because he's now said some things which are really interesting. And also, you know, look, we have some serious credibility issues here. So I do have the right to go into the credibility. I mean, the witness is now saying this just doesn't -- basically a shift doesn't have anything to do with it. And that's pretty fascinating, given the collective bargaining agreement.

THE ARBITRATOR: Well, when you start getting into have you read the collective bargaining agreement, we went through all that.

MR. RICHMAN: Well, what you did was cut it off and said I could read the collective bargaining agreement and I don't need his interpretation of it. But I want his mindset, because I am attacking his credibility.

MR. MILLER: He had an

Page 1021

Hayes - Cross

opportunity to do that the last time around. And he also had an opportunity to cross-examine Mr. Claffee, who is the person at The Times who is most knowledgeable about how contributions are made.

THE ARBITRATOR: In fairness, Mr. Hayes was asked, and did talk repeatedly about what is the basis of contributions. So while I made the effort seeing if I could trade off the last answer for cutting it off, that deal is not acceptable.

MR. RICHMAN: I'll trade off the percentages. If you want to trade off all of that discussion, either that or we're going to go through the whole thing and it's not going to be short.

MR. MILLER: Well, I will take you up on your offer. It was a summation question obviously, and I appreciate that, but the remainder of his testimony remains in.

Page 1022

Hayes - Cross

THE ARBITRATOR: Okay, go ahead.

MR. MILLER: Exactly. The questioning was about what happened at the meeting.

THE ARBITRATOR: But it was also about his understanding of what the basis of the contribution was. It wasn't about what was or wasn't said at the meeting. It was certainly broader. So go ahead, let's just get this done with. Go ahead.

FURTHER EXAMINATION BY MR. RICHMAN:

Q. So let me show you the collective bargaining agreement, Mr. Hayes, which I understand from your testimony the prior time that you testified, you had read. This is Exhibit 8. Let's look at page 55. Do you see that Pension Fund language?

A. Yes, I do see the language.

Q. And do you see it says the publisher agrees it shall contribute 8 percent of each employee's pay rate per shift for each shift worked by each employee in the bargaining unit -- I will

Page 1023

Hayes - Cross

skip the name of the fund -- but not in excess of five shifts in any payroll week in any one office for any one employee. Do you see that?

A. Yes.

Q. And so what I would like to know after reading that, do you still believe that shifts have nothing to do with the contribution obligation of The New York Times?

MR. MILLER: Objection. Is he asking for a contract interpretation or is he asking him for his understanding of how The Times contributes?

MR. RICHMAN: I said do you believe. I want his view. Does he believe.

THE ARBITRATOR: Well, to the extent that all the prior testimony was about his understanding of what the basis of the contribution is, this goes to his understanding. Go ahead.

A. What was your question again

Page 1024

Hayes - Cross

please?

Q. My question is, and if you need to take a look at this language, I'll give you the time to take a look at it. My question is do you still believe that the contribution obligation of The New York Times to the Pension Fund has nothing to do with shifts?

A. No, I stand corrected after looking at this. It is capped by five shifts, so our percentage of wages is capped at the five shifts.

Q. Okay, and did you ever form a belief of the phrase in the Pension Fund language about the publisher agrees it shall contribute eight percent of employees' pay rate per shift for each shift worked? Is that how --

MR. MILLER: Objection, now he's really asking about his contract interpretation.

MR. RICHMAN: No, I'm asking if he ever developed a belief about what that meant.

Hayes - Cross

MR. MILLER: That's asking for his contract interpretation, belief based on the language of the contract.

THE ARBITRATOR: Well, he's testified as to his belief is based on something, so you can inquire. Go ahead.

THE WITNESS: My belief is not based on this language.

Q. It's not based on this language?

A. No.

Q. And is it your belief that this language is irrelevant?

MR. MILLER: Objection. It's argument.

THE ARBITRATOR: Yes, it's argument.

Q. So in various actuarial reports that we've gone through today in minutes as well as reports that are attached to the minutes, when there is a phrase, for example, eight percent of wages as the contribution rate, that is not the full description of the contribution rate, is

Hayes - Cross

it?

MR. MILLER: Objection. We haven't gone through actuarial reports.

MR. RICHMAN: The actuary's reports at the meetings. The actuaries reported at the meeting.

THE ARBITRATOR: Okay, so what' the question? I'm sorry.

Q. So when the phrase is used, eight percent of wages or some other percentage of wages, that's not a full description of what the contribution obligation is, is it?

A. Yes.

Q. It is? So there is no six shift limit in your mind?

A. The limit as we just read here is five shifts.

Q. Okay, sorry. You're right. I stand corrected. But that limit doesn't appear anywhere in the reports that the actuary gave at various trustees' meetings, correct?

MR. MILLER: Objection. Now

Hayes - Cross

he's asking about what was contained in reports.

MR. RICHMAN: No, reports are describing --

MR. MILLER: Oh, the meeting description?

MR. RICHMAN: Yes.

THE ARBITRATOR: Thank you, go ahead.

A. There was no discussion about shifts.

Q. Okay, and so there is no discussion about any limit on the contributions in terms of wages, correct?

A. There is no discussion about shifts.

Q. I asked you a question. And my question to you was, is there any discussion in the reports, and I mean the oral reports that the actuary gave at various Fund meetings that we went through at some length today about any limit on wages being used for the calculation of pension contributions?

Hayes - Cross

A. It was always stated as a percent of wages.

Q. So there was no limit stated?

MR. MILLER: In the discussions.

Q. In the discussions.

A. No.

Q. And you were very familiar with the PowerPoints, the PowerPoint presentation that the Segal folks made for apparently four hours or something like that, from that length, is that right?

A. I have no specific on how long it lasted. I just know the whole meeting was about this PowerPoint. And it wasn't a -- it was really an interactive program.

Q. And in that report, the interactive report provided by the actuaries to the trustees, was there a discussion about a limit on the amount of wages that would be used for calculating pension contributions?

A. No.

Q. Did you ever hear the actuary talk about the limit of wages that could be

Hayes - Cross

used to calculate pension contributions?
A. Not that I recall.
Q. Now, I just want to make sure the record is clear on something. We talked about a -- we didn't talk, you testified about an employee's shift contribution.
A. Yes.
Q. And that was to the Welfare Fund?
A. Yes.
Q. And that was a contribution made by, actually by employees?
A. Yes.
Q. It was not a contribution made by The New York Times, correct?
A. Yes.
Q. Now, is it your view that the -- putting aside the employees's shift contribution, that contribution to the Welfare Fund, and I'm not talking about percentages because I know those changed. The contributions to the Welfare Fund were derived differently than contributions to the Pension Fund?
Now, in your view, putting aside

Hayes - Cross

the employees' shift contribution to the Welfare Fund, and I'm not talking about the different percentages that were used for the Pension and Welfare Fund, but was the basis for making a contribution to the Welfare Fund different than the basis for making a contribution to the Pension Fund?
MR. MILLER: You're talking about the employer contribution?
MR. RICHMAN: Employer contributions, yes.
A. Yes.
Q. It was different. And why was it different?
A. There are other elements that are part of that calculation. I'm not close enough to be able to identify them for you, but they're different.
Q. And are they both subject to a limitation on the number of shifts?
A. As I said, I'm not close enough to all the elements of the welfare contribution to say that's true. I do know now, there is this sixer, where if you work

Hayes - Cross

a six shift, there is a contribution. But that limit it maybe a couple of years old.
Q. After the assessment of withdrawal liability?
A. Somewhere around the same -- it was before because we were talking about the FIP at the time, so they were talking about putting money back into the Welfare.
Q. I want to go to Exhibit 128, please. And as I recall your testimony you were present at this meeting, is that accurate?
A. I have no reason to think I wasn't there.
Q. So I want to turn to page 3320, which is the second page of the April 17th Segal report. And it's April 17th of 2008.
MR. MILLER: This is Exhibit C?
MR. RICHMAN: Yes, it is Exhibit C.
Q. You'll know you're there when you see 3320. And did the Segal folks go over this report in the meeting?
A. There was discussion at the

Hayes - Cross

meeting, yes.
Q. Okay. And so if you'll look in projected industry activity, that's 4.
A. Yes.
Q. And if you go towards the bottom of the page, and I believe it is the last sentence, please note that on this point we need an assumption for both the average shifts per active participant, projected number of active participants and the expected wage increases in future years since contributions are a percentage of wages. Do you know why the Segal folks were asking for information on average shifts per active participant?
A. I can only make an assumption of what they were asking for.
Q. I don't want you to assume.
A. I don't know what's inside their heads.
Q. So you read this report?
A. Yes.
Q. And so when you read this report you saw this line, the last sentence of

Page 1033

Hayes - Cross
what's labelled paragraph four?
A. Right.
Q. Did you ask a question about why are you asking about average shifts?
A. No, there was no discussion at that meeting about the shifts, so there was no discussion between the trustees and Segal about that language.
Q. Okay, so nobody at the meeting actually said well, why do you need shifts?
A. No.
Q. Okay, and when are you read it, you didn't think it was odd that they were asking for shift information?
A. Like I said, no, I have my thoughts on why they needed it.
Q. Okay, but that wasn't my question.
A. No, I did not ask them.
Q. Okay, you didn't ask, you didn't think it was odd?
A. No.
Q. And as far as you know, nobody else asked?

Page 1034

Hayes - Cross
A. That's correct.
Q. Let's go to Exhibit 140, please. Now, I want to focus on the Segal report on El Diario. Now, as I understand it, you don't know, and correct me if I'm wrong, you don't know for sure whether you were there during this report or not?
A. I don't recall this report, so I assume I wasn't there.
Q. But there are lots of other things you don't recall about the meetings of the trustees over the years, but you still may have been there, correct?
A. I don't think I was there for this, because of what was being talked about.
Q. And if you became aware of what was being talked about, would that have caused you to do something?
A. It would have caused me to ask maybe some questions.
Q. Okay. And so when you left the meeting, did anyone else leave with you?
A. No.

Page 1035

Hayes - Cross
Q. Okay. And so --
A. Leave with me to go to my meeting?
Q. Or leave with you, whether --
A. I don't know who may have left at the same time I did or after me, I have no idea.
Q. You have no idea. And you have no reason to believe that any of the other attendees of the meeting who are listed on the first page of the minutes, let's take a look at who was there, you have no reason to believe that any of those people other than those people who -- where it's denoted also present for a portion of the meeting?
A. Yes.
Q. That's 3173. So let's take everybody above that group. Do you have any reason to believe that any of those people left that meeting at the time that you left the meeting?
A. As I stated, no-one left with me.
Q. So have you no reason to believe that anyone else left the meeting, is that

Page 1036

Hayes - Cross
correct?
A. I don't know, is my answer.
Q. Okay, no, I'm asking you if you have any reason to believe that any of these people above the line where it says also present for a portion of the meeting, whether you have any reason to believe that they left the meeting before the meeting concluded.
A. I have no reason to believe.
Q. Now, did Mr. Schelberg report to you that there was a discussion about El Diario?
A. No.
Q. Did he report to you that there was a discussion about El Diario and partial withdrawal liability?
A. No.
THE ARBITRATOR: Well, he already said there was, and I think that El Diario, then conjunction has got to be right, because it requires both things.
MR. RICHMAN: Unless it

Page 1037

Hayes - Cross
changes.
THE ARBITRATOR: So if you want to know about partial withdrawal liability, you have to ask that question.
Q. Okay, and so did anybody at the meeting, I can go one by one, but it will be less painful -- did anyone at that meeting -- you have no reason anybody actually left that meeting before it concluded, report to you, writing or orally or in any way, that there was a discussion about partial withdrawal and the need to calculate shifts for El Diario?
A. No.
Q. Did anyone report to you that they objected to Segal's approach with respect to El Diario?
MR. MILLER: Objection, in light of his past testimony.
THE ARBITRATOR: He has no knowledge about El Diario being discussed at all.
MR. RICHMAN: I know. Did

Page 1038

Hayes - Cross
anyone report to you -- all these people were at the meeting. I want to know whether anybody at the meeting reported to him about -- did they say to you, there is an issue with partial withdrawal liability.
THE ARBITRATOR: Period. Ask that.
Q. Okay, anybody at that meeting report to you on that?
A. No.
Q. Okay, did anybody at the meeting report to you about that they disagreed with Segal's approach?
MR. MILLER: Objection. Same reasoning.
Q. You can answer the question in one word.
THE ARBITRATOR: Go ahead, just answer it, please.
A. No.
Q. Now, do you know the exact time you left the meeting?
A. No.

Page 1039

Hayes - Cross
Q. And as you testified previously, your office is across the street from Proskauer's office where the meeting was held, correct?
A. Yes.
Q. And how long would it take you to get across the street?
A. A couple of minutes.
Q. And if you notice first of all in the first page of the minutes, we were talking about the people above the line that said also present for a portion of the meeting?
A. Yes.
Q. And you see Ms. Lotruglio and Tom Mazars and Mitch Lewis are mentioned as attending a portion of the meeting, do you see that?
A. Yes.
Q. But you're not listed as attending a portion of the meeting?
A. That's true.
Q. Do you have any understanding as to why you weren't reported as being

Page 1040

Hayes - Cross
present for only a portion of the meeting?
A. No, I don't.
Q. So this meeting occurred on October 11, 2011. That's correct, right?
A. Yes.
Q. And when was the next meeting of the Fund, do you recall?
A. Not without checking my schedule.
Q. Let's go to the next meeting of the Fund, 141. Now, on page 1 of 141, there is a date for the meeting that says December 9, 2011, do you see that?
A. Yes.
Q. Okay, that is a little less than two months after the meeting that occurred on October 11th, correct?
A. Yes.
Q. Okay. And I understand that you do not recall reviewing the minutes from the meeting that's Exhibit 140.
A. That's correct.
Q. Okay. Can you say for certain here today that you did not review those minutes?

Page 1041

Hayes - Cross

A. I can say that I don't recall reviewing those meeting minutes.

Q. And now, as I understood, you said during this period of time, this two-month period of time, that you were very busy at work?

A. Yes.

Q. Okay. Is it incorrect to say that you're usually pretty busy at work?

A. This was extraordinary because we were doing a reduction in force.

Q. Okay. And is it your testimony that you think you may not have had enough time to review the minutes of the meeting that occurred on October 11, 2011?

A. That wasn't my testimony. My testimony is that I was focused on other issues. So I have no recollection of reading those minutes, or reviewing them.

Q. Okay. Do you know who took the minutes of the meeting?

A. Usually Segal takes the minutes.

Q. And then what's the process that follows that?

Page 1042

Hayes - Cross

A. He'll send the minutes, he'll send the minutes out for review. The time period is flexible when you get it. And then when we actually get to the meeting, there is only a set of minutes that need to be signed, we don't get a whole new set of them. So we don't review them again at the meeting.

Q. Right, okay. And when you say that Mr. Urbank sends them out or Segal sends them out for review, to whom do they send minutes out to review?

A. I know I get a copy. I believe the attorneys get a copy. I don't know if it goes to anybody else other than the trustees.

Q. Okay. If you look at the December 9, 2011 minutes, and it says approval of prior minutes on the first page.

A. Yes.

Q. Do you see that?

A. Yes.

Q. And it says the minutes of the

Page 1043

Hayes - Cross

regular meeting held on October 11, 2011 previously distributed by mail were reviewed. Do you have any reason to believe that that didn't happen?

A. You mean an actual review?

Q. Yes.

A. Yes.

Q. Okay, and so these minutes are incorrect?

A. Well, I think what these minutes speak to, if I recall there were some corrections to the minutes that were mailed out. So the only thing that may have been reviewed are the corrections.

Q. And so you remember that on December 9, 2011, sitting here today, you remember that the review was of some corrections?

A. I'm reading just the minutes itself, the approval of the minutes. It mentions that.

Q. But you don't have an independent recollection of that?

A. No, I don't.

Page 1044

Hayes - Cross

Q. Did anyone, Mr. Schelberg -- let's take Mr. Schelberg, suggest to you that he -- that you ought to review the minutes of the October meeting?

A. It's standard procedure that we should always as trustees review the minutes.

Q. And I appreciate that, and I agree with that wholeheartedly. But that wasn't my question. My question was did Mr. Schelberg tell you --

A. No.

Q. I'm sorry, let me finish so we get the record straight. Did Mr. Schelberg tell you to review the minutes of the October 11th meeting?

A. No.

Q. Did anybody else associated with the Fund say to you something to the effect that you ought to review the minutes of the October 11th meeting?

A. No.

Q. So let's go back to 140 again. So Segal gives its report that's labelled

Hayes - Cross

eight, Roman numeral eight in the minutes, it's on page 4 of the minutes, do you see that?
A. Yes.
Q. And by the way, were the minutes, were they -- did they go chronologically, that is the first thing that happened at the meeting was the first thing that occurred in the minutes and the same way after that?
MR. MILLER: Do you understand the question?
THE WITNESS: I don't think I understand his question.
Q. So the minutes say, there is a call to order, right? That happened first. Do you see that on the first page?
A. Yes.
Q. And then it has a Roman numeral 2 and 3?
A. Yes.
Q. And what I'm asking you about is do the minutes actually report the sequence of the events that occur at the meeting?

Hayes - Cross

MR. MILLER: These minutes or generally?
Q. Well, in general.
A. In general, yes.
Q. Okay.
A. There are times when we jump around on the agenda, because really, the minutes are done after. The agenda at the meeting is what you're really looking at. And so sometimes you move this agenda around as the meeting is actually taking place. I can't speak to, because I've never really noticed, if the minutes follow what actually happened. So I can't give you an answer to that.
Q. At this meeting there was a -- well, let's take, if you look at page five of the minutes, and I'm looking at Roman numeral 10.
A. Yes.
Q. Fund office. And there was a motion made and seconded approving ratifying the August 1, 2011 poll vote approving a three percent wage increase, do

Hayes - Cross

you see that?
A. Yes.
Q. Were you there for that vote?
A. I don't recall if I was there for the vote. I do recall talking it over with the other management trustee, and I think we did it in a sidebar. But I don't recall being -- I don't recall if I was there for the actual motion.
Q. Because the motion was made, seconded and unanimously adopted ratifying the August 1, 2011 poll vote. Do you know what a poll vote is?
A. What it says, you'll get a call, they'll ask you.
Q. And this seems to indicate, and tell me if you believe otherwise, this seems to indicate there was an August 1, 2011 poll vote, correct?
A. Yes.
Q. And these are the minutes of the October meeting. Am I correct in saying that the motion was to ratify the August 1, 2011, poll vote?

Hayes - Cross

A. That's what it says.
Q. And you don't know whether you were there for this motion?
A. Yes, I don't know.
Q. And let's turn the page to page 6. And you see it says appeals?
A. Yes.
Q. And there is a motion made, seconded and unanimously adopted to deny Mr. Iaconi's appeal. Do you see that?
A. Yes.
Q. Were you there for that vote?
A. I don't know. As I said, what usually happens is that we'll move things around. I don't have any specific memory of this particular yes or no. I don't recall.
Q. Let's go down to B, again still under appeals. And this had to do with an appeal of a participant Joseph Testagrossi?
A. Yes.
Q. And then if you look down a couple of paragraphs, it says motion was made, seconded and unanimously adopted to

Hayes - Cross

deny Mr. Testagrossi's appeal subject to the union trustees' further review of the appeal, do you see that?

A. Yes.

Q. Were you there for that vote?

A. I don't know. As I said, there are times when we moved things around, and so I don't know if Murray might have asked us at the beginning knowing I had to leave, so I don't recall.

Q. Had you told others who were attending the meeting that you had to leave the meeting early?

A. Most of the occasions when I know that I have another meeting to go to, I will let it be known early.

Q. But that's not the question I asked you.

A. The answer is probably.

Q. But you have no recollection of telling people that you were leaving this meeting earlier?

A. It is my normal practice to tell people that.

Hayes - Cross

Q. I'm asking you whether you have a recollection.

A. No, I don't. I have no specific recollection.

Q. Okay. Do you know what a quorum is?

A. Yes.

Q. What is it?

A. It's the minimum number required to hold the meeting.

Q. And do you know what the quorum requirement for the Pension Fund is?

A. No.

Q. Let me see if maybe I can jog your memory here. Let's take a look at Exhibit 47. It's in the red book, or orange binder, 47. So do you know what this document is?

A. It looks to be a copy of the plan document.

Q. The agreement and declaration of trust?

A. Yes.

Q. Do you know the difference

Hayes - Cross

between an agreement and declaration of trust and the plan document?

A. Yes.

Q. Can you tell us what that is?

A. The plan document speaks to the plan, what the requirements are, participants and that sort of thing. This is the agreement to establish the plan.

Q. And to govern the plan, is that fair to say?

A. Yes.

Q. And to govern the plan, okay. So let's take a look at page 28.

A. Got it.

Q. And in section 6.2, and -- I'm sorry, 6.3, the section entitled quorum.

A. Yes.

Q. And it says that the quorum for transaction of business at any regular or special meeting of the trustees shall consist of two union trustees and two employer trustees. Do you see that?

A. I do.

Q. Okay, do you know whether there

Hayes - Cross

was a quorum present if you left the meeting for the other trustees to conduct business?

A. According to this there shouldn't have been.

(Recess taken: 12:14-12:39 p.m.)

FURTHER CROSS-EXAMINATION BY MR. RICHMAN:

Q. Alright, let's go back to Exhibit 129 for a different reason. And you were present at this meeting, correct?

A. Yes, I'm listed as being there.

Q. Do you have any recollection of being there?

A. No recollection.

Q. Let's turn to page 7. I understood your testimony the first time you testified that there was no discussion at the meetings as to other employers' contribution obligations. Is that your testimony today?

MR. MILLER: Objection.

THE ARBITRATOR: I'm sorry, I was reading this. What was the question?

Page 1053

Hayes - Cross
MR. RICHMAN: The questioning was about his prior testimony about the lack of discussion about other employers' contribution obligations.
Q. And I'm happy to go back to page 196 of his hearing transcript, and at line 17.
"Question: Now, do you know, or did you ever know how other employers contributing to the Pension Fund contributed?
"Answer: No.
"Question: Okay, so as a trustee you never inquired into that?
"Answer: As a trustee it never came up at any trustee meeting as to how they were doing it. I only know how we were doing it."
THE ARBITRATOR: Okay, what's your question?
Q. Let's take a look at the F, above Hudson News, minimum contributions. And you see it talks about Hudson News distributors in connection with a minimum

Page 1054

Hayes - Cross
shift guarantee pertaining to the Pension Fund?
A. I see that.
Q. Were you present during that discussion?
A. I have no reason to -- I don't know. I will say that I have no reason to think that I wasn't there for that.
Q. And did you raise a question about shift guaranties?
A. No.
Q. Did anyone else at the meeting raise a question about shift guaranties?
A. Not that I recall.
Q. Did anyone else at the meeting including yourself raise a question about how Hudson News distributors contributed to the Pension Fund?
A. Not to my knowledge, no.
Q. Now let's take a look at Exhibit 130, please. I'm sorry, let's go back to -- just for one more question back to the November 21, 2008 Exhibit 129 minutes.

Page 1055

Hayes - Cross
A. Okay.
Q. Is that your signature on page 8 of the minutes?
A. Yes.
Q. So you read these minutes before you signed them?
A. Yes.
Q. Okay. So let's go to Exhibit 130. Were you at this meeting?
A. I have no reason to think I wasn't. My name is listed.
Q. Alright, and let's take a look at page 5 of the minutes. And if you could read that please to yourself.
A. Okay.
Q. Were you present during this discussion?
A. I have no reason to believe I wasn't.
Q. Okay, did you ask any questions about the Pension Fund, Mr. Schwartz's report? Sorry, let's withdraw that.
Did you ask any questions about Mr. Schwartz's report contained in the

Page 1056

Hayes - Cross
paragraph titled E in these minutes?
A. I don't recall asking any questions about that.
Q. Did anyone else ask any questions about this?
A. I don't recall.
Q. And let's take a look at the last page of the minutes before the exhibits, and that's page 7.
A. Yes.
Q. Is that your signature?
A. Yes, it is.
Q. And did you read these minutes before you signed them?
A. I would think I reviewed these minutes either when they mailed them out or glanced through them when I signed it.
Q. Okay, but you would have read them before you signed them?
A. Yes.
Q. Let's go to Exhibit 138, please. And were you present at this meeting?
A. I'm listed as being here. There is no reason for me to think I wasn't.

Page 1057

Hayes - Cross
Q. Okay, so let's take a look at page 2. Take a look at the bottom of page 2.
A. Yes.
Q. Alright. And it says Mr. Murphy requested that Segal provide the trustees with a report setting forth the projected, and I'm flipping the page, contributions based on contribution rates under the default schedules and estimated shift totals through 2020 for the three largest contributing employers to pension plan.
Were you there when Mr. Murphy asked this question, or made this request?
A. I don't have any specific recollection, but I was probably there.
Q. Okay, is there any reason to believe you left the meeting early?
A. No.
Q. And did you ask Mr. Murphy why he wanted this information?
A. No.
Q. Did anybody else at the meeting ask Mr. Murphy why he wanted this

Page 1058

Hayes - Cross
information?
A. Not to my recollection.
Q. Let's go to Exhibit 145. Were you present at this meeting?
A. I am listed as being there, yes.
Q. Okay, any reason to believe you weren't there?
A. There is no reason for me to believe I was not there.
Q. And let's flip to page four, please.
A. Yes.
Q. And you see Roman numeral 4, El Diario mistaken contributions, do you see that?
A. Yes, I do.
Q. Could you read that to yourself, please.
A. Yes.
Q. So Mr. Schwartz is giving this report on El Diario and contributions, correct?
A. Yes.
Q. Okay, and he reported that El

Page 1059

Hayes - Cross
Diario had overpaid its contributions, is that correct? I'm looking at the second sentence, if that's helpful.
A. Yeah, I see that, yes.
Q. Okay, and that the collective bargaining agreement does not require contributions in excess of five shifts in any payroll week, do you see that?
A. Yes.
Q. Did you ask any questions of Mr. Schwartz about that part of his report?
MR. MILLER: Well, he didn't testify that he has any recollection.
MR. RICHMAN: I know, but he's now read something and I'm asking if he asked any questions.
A. I did not ask questions, because this was about -- I didn't ask questions.
Q. Okay. So let's go down to, you see the sentence beginning after discussion?
A. Yes.
Q. And it talks about Welfare Fund for shifts for which contributions weren't

Page 1060

Hayes - Cross
due, and then it says and further authorized El Diario to take a credit for the erroneously paid shifts to the funds on its next contributions due to the Fund, do you see that?
A. Yes, I do.
Q. And did you ask Mr. Schwartz about this credit that was being discussed?
MR. MILLER: Let me object. Again, he still has not testified one way or the other whether he even remembers this discussion.
THE ARBITRATOR: Well, he can say I don't remember whether I asked any questions.
A. I don't recall asking any questions.
Q. And do you recall whether anyone else at the meeting asked questions about erroneously paid shifts by El Diario?
A. I don't have any recollection.
Q. Do you recall whether anybody at the meeting asked any questions about why are we discussing shifts?

Page 1061

Hayes - Cross

A. No.

Q. Okay. Now, at the bottom of that paragraph there was a motion that was made, seconded and unanimously adopted to -- the first part is to refund the employee, the mistaken self-payments, also made to the Welfare Fund, and it says to allow the employer to take a credit for the erroneously paid shifts to the Funds on its next contribution payment due to the Funds. Do you see that?

A. Yes, I do.

Q. And you voted for that?

A. Yes.

MR. MILLER: Well, do you remember?

MR. RICHMAN: No, no, excuse me, I'm on a cross-examination here.

THE WITNESS: I probably voted for that, yes.

Q. Do you have any reason to believe that this, the description of the motion made, seconded and unanimously adopted includes you voting in favor of it?

Page 1062

Hayes - Cross

A. I have no reason to think I didn't.

Q. And can you tell us why you voted for it?

A. They had paid in excess of five shifts a week in their calculation of their contribution, their percentage, so they were over the limit of five shifts. That's all we pay on. So it was, if you will, whatever those wages associated with that shift, that was it. I understood that. Both the employee and the employer had paid on the sixth shift.

Q. So let's go down to Roman numeral five. Do you see that? Mr. Carl Giordano, Hudson News settlement?

A. Yes.

Q. And I'm focused on E, but feel free to read the whole thing if you like.

A. Focused on?

Q. E, little E. You see that, where it says, had Mr. Giordano not been wrongfully discharged, he would have been working, and on that basis Hudson is

Page 1063

Hayes - Cross

willing to pay pension and welfare shifts as necessary to get him back to the point at which he can retire with a disability pension from the Fund. Do you recall this discussion?

A. Not specifically, but I'm sure I was there for it. I'm pretty sure I was there for it.

Q. So did you raise a question about why there was a discussion about Hudson is willing to pay pension shifts as necessary?

A. No, I understood what that was for.

Q. Okay, and did you ask a question about that?

A. I understood what it was for.

Q. Okay, did anybody else at the meeting ask a question about it?

A. There was a lot of discussion around it. There was a lot of discussion around it.

Q. And did anyone in that discussion ask her why are they paying shifts?

A. No. As I said, I understood and

Page 1064

Hayes - Cross

I thought everyone else understood.

Q. And what was your understanding?

A. The employees get credit for eligibility based on the number of shifts that they work or are paid for. This was to make them qualify for that benefit.

Q. Okay, and to qualify for that benefit, the employer was willing to pay for pension shifts, correct?

A. Yes.

Q. That's the way they were going to contribute?

A. Well, I can't say that's how they were going to contribute. What I can say to you is that that was the way that the employee would get credit, and this was Hudson News working to get this employee credit so he would be eligible, and so there is an eligibility issue as far as the shift discussion was concerned.

Q. Well, the minutes say that Hudson is willing to pay pension shifts as necessary.

A. Yes, for eligibility. I have no

Page 1065

Hayes - Cross

idea and there was no discussion about how, what it was based on, it just said shifts. But it was an eligibility issue.

Q. Well, it's eligibility for the employee.

A. Employee, yes.

Q. But a contribution for the employer, correct?

A. Yes.

Q. Now, if you'll flip the page, you'll see there was a motion made, this is on page 5.

A. Yes.

Q. Seconded and unanimously adopted to accept such contributions from Hudson News and award Mr. Giordano disability pension subject to Hudson News contributing on the required number of shifts as determined by the Fund Office, do you see that?

A. Yes.

Q. And you voted for those?

A. Yes.

Q. And if you look down at the

Page 1066

Hayes - Cross

signature of the employer trustee in the minutes, is that your signature?

A. Yes, it is.

Q. Did you read these minutes before you signed them?

A. I read these minutes when they were distributed and just reviewed them when I signed them.

Q. So you had read them before you signed them?

A. Yes.

Q. Okay, thank you. Okay, let's go to 146 please. And this is our friend Mr. Giordano again.

A. Yes.

Q. Were you present at this meeting?

A. It says I was there; I have no reason to believe I wasn't.

Q. Do you remember attending the meeting?

A. As I said, I don't have any specific recollection, but it says I was there; I have no reason to believe I wasn't there.

Page 1067

Hayes - Cross

Q. You're welcome to read the whole description. I'm going to focus on the -- about two thirds of the way down where it starts with Mr. Bluestein noted the trustees agreed at the September 12th meeting, do you see that?

A. Yes.

Q. That the Funds could accept such contributions from Hudson News and that Mr. Giordano would be awarded a disability pension subject to Hudson News contributing on the required number of shifts, and then it talk about Mr. Giordano being determined to be permanently disabled. Do you see that?

A. Yes.

Q. Did you ask any questions about that?

A. There was a lot of discussion about it, so I have to believe there were questions asked.

Q. Okay, you don't know whether you asked any questions?

A. I don't have any recollection if

Page 1068

Hayes - Cross

I did or did not.

Q. Do you recall being at this discussion?

A. Not specifically, but I have no reason to think I wasn't.

Q. Okay, do you have any reason that you left this meeting early?

A. No.

Q. And then if you go down a little bit, the last sentence on that page, it says, Mr. Bluestein explained the Fund Office thereafter had calculated Hudson News would have to pay the funds on 650 shifts. And it talks about a different number of shifts for different years, right? And then -- do you see that?

A. Yes, I do.

Q. Okay, and so Hudson News, according to Mr. Bluestein, would report on what the Fund Office wanted, they wanted Hudson News to pay on all these different shifts, correct?

A. Yes.

Q. Okay. And then if we flip the

Page 1069

Hayes - Cross

page to page 2, do you see page 2?

A. Yes, I do.

Q. And there's a motion made, and the motion was made, seconded and unanimously adopted to required Hudson News to contribute to the Pension and Welfare Funds for a hundred shifts in the accrual year February 1, 2012, do you see that?

A. Yes, I do.

Q. And you voted for that?

A. Yes. I have no recollection, but I'm sure I did.

Q. Okay, and did you raise a question about Hudson News contributing to the Pension Fund for a hundred shifts?

A. No, because I understood what it was for.

Q. And let's just flip to page 3, please, of the same exhibit. Is that your signature?

A. Yes, it is.

Q. And did you read these minutes before you signed them?

A. Yes, I did.

Page 1070

Hayes - Redirect

MR. RICHMAN: We're finished.

MR. MILLER: Just a couple of minutes; we will have a small amount of redirect.

(Recess taken: 1:03-1:15 p.m.)

REDIRECT EXAMINATION BY MR. MILLER:

Q. Mr. Hayes, in connection with your cross-examination testimony with Mr. Richman, there was a discussion of a recent sixer contribution, do you remember that?

A. Yes.

Q. And I just want to clarify for the record, the sixer contribution is made to which Fund?

A. The Welfare Fund.

Q. And there was mention of Neil Schelberg in your cross-examination, and I want to ask you, is Mr. Schelberg a lawyer for The New York Times?

A. No, he's not.

Q. There was some testimony in connection with your cross-examination about minimum shift guarantees. Does The

Page 1071

Hayes - Redirect

New York Times have a minimum shift guarantee with the union relating to contributions to the Pension Fund?

A. No, we do not.

Q. In your experience as a trustee of this Pension Fund, do trustees ever leave trustee meetings during the course of the meeting?

A. Yes.

Q. How often does this occur?

A. It happens quite often. They may not be gone for the entire meeting, but they may have to step out to do conference calls and that sort of thing.

Q. And finally, are you generally familiar with the rules to be eligible for a pension under the NMDU Fund?

A. Generally, yes.

Q. And can you briefly describe the rules governing eligibility for that?

A. Yes. An employee who works a hundred shifts will receive a pension accrual for that year.

Q. So that would be a hundred shifts

Page 1072

Hayes - Recross

a year?

A. Yes.

Q. And do you need a certain number of pension accruals to be eligible for a pension?

A. Yes.

MR. MILLER: I have nothing else.

RECROSS-EXAMINATION BY MR. RICHMAN:

Q. Mr. Hayes, you mentioned that it happens quite often that people may leave for part of the meeting, correct?

A. Yes.

Q. And I just want to make sure I understand your testimony. You say they may not be gone for the entire meeting, but they may have to step out to do conference calls and that sort of thing?

A. Yes.

Q. Is it unusual for somebody to leave the meeting in the middle of the meeting and not come back?

A. It does occur. Not very often.

Q. And other than the time that you

Page 1073

Hayes - Recross

have testified you did that on October 11th of 2011, was there another time that you left the meeting early and didn't come back?

A. Not that I recall off the top of my head. I was focused on that because it was pointed out to me.

MR. RICHMAN: That's all.

MR. MILLER: Mr. Hayes, thank you.

(Luncheon adjournment: 1:20 p.m.)

Page 1074

Egan - Cross

AFTERNOON SESSION

(Time noted: 2:15 p.m.)

ROSANA EGAN, recalled as a witness, having previously been duly sworn, was further examined and testified as follows:

CONTINUED CROSS-EXAMINATION BY MR. MILLER:

Q. Good afternoon, Ms. Egan. I'm going to be asking you a variety of questions that relate to the documents that you'll find in that yellow binder. I'm going to be splitting the questions into two categories. One category is questions that relate frankly to the second issue in the case, the Segal blend, and the other sets of questions will relate to the contribution base unit issue. And that means that we will not be going in chronological order in regard to the documents. But I think this will make the process easier to understand and we'll get through it more quickly.

Let me ask you a couple of foundational questions before we get into

Page 1075

Egan - Cross

the documents. During your time as actuary for the NMDU Fund, you selected a 7.5 percent rate as the investment return assumption for the Fund, correct?

A. For a portion of the time. I'm not sure if it's the whole time as the actuary. I don't remember going back to day one.

Q. But certainly in the more recent years you had selected a 7.5 rate as the investment return assumption, correct?

A. Yes.

Q. And you also used the 7.5 percent rate as the discount rate to value the plan's liabilities for funding purposes, correct?

A. Yes.

Q. And once you set a discount rate and an investment return assumption, do you review the continued use of that particular selected rate annually or with some frequency?

A. Yes.

Q. Do you in fact review it

Page 1076

Egan - Cross

annually?

A. Yes.

Q. And generally when you go about setting an investment return assumption for a multi-employer plan, do you review the multi-employer plan's investment policy statement and take account of how the assets are targeted to be invested?

A. We would use as part of the process what their target asset allocation would be.

Q. So the answer to my question is yes in part, and as part of the process you would take account of how the assets are targeted to be invested, correct?

A. Yes.

Q. Okay, and specifically in the case of the NMDU Fund in setting the 7.5 percent assumption for future investment returns, did you examine the NMDU Fund's investment policy statement?

A. I don't remember off the top of my head if I looked at the policy statement.

Page 1077

Egan - Cross
Q. Did you review the NMDU Fund's targeted asset allocations?
A. I would have gotten the target allocation.
Q. And reviewed them?
A. I might have just gotten, you know, 20 percent is in this kind of assets, 30 percent is in this kind. It might have been not the whole report necessarily.
Q. But the information would have been obtained and used in the development of the rate?
A. Yes.
Q. Okay, so with that as background, let's turn to what's numbered as Exhibit 120 in this yellow binder. I'm not going to ask you about the minutes and agenda for the minutes contained within this exhibit. Instead if you turn to a document on the bottom right, 3263, which is also labelled Exhibit C to these minutes, it's a statement of investment objectives and policy. That's the document that I'm going to call to your attention.

Page 1078

Egan - Cross
I know it's a fairly lengthy document; my questions are going to be rather limited; but take a moment or two to familiarize yourself with the document.
Let me ask you, have you ever seen this document before?
A. I don't remember if I've ever seen this before.
Q. Do you remember seeing the investment policy statement for the NMDU Fund?
A. I'm not sure when you say investment policy statement, is that this report?
Q. Well, you just testified that you don't recall reviewing this document.
A. I don't remember. I don't remember if I did or didn't.
Q. So I'm going to ask you more broadly, do you remember reviewing an investment policy statement for the NMDU?
A. Not specifically.
Q. Why don't I draw your attention back to page 3053. And Ms. Egan, there is

Page 1079

Egan - Cross
a reference to a person named Mark Lotruglio as being present for that meeting, and it's referenced that Mr. Lotruglio is with Quan-Vest Consultants, do you see that?
A. Yes.
Q. And am I correct that Quan-Vest Consultants is and was the investment advisor to this Fund?
A. Yes.
Q. And Mr. Lotruglio works at Quan-Vest Consultants?
A. My understanding.
Q. Yes. I recognize that you don't recall seeing this document in particular. Nonetheless, I do want you to look at page 3265, this document being the policy statement. Take a look at page 3265, which is the second page of this investment policy statement.
A. Okay.
Q. And can you read to yourself what is under paragraph D on that page, and particularly D1, actuarial investment

Page 1080

Egan - Cross
return assumption.
A. Okay.
Q. So this statement says that over a complete market cycle, which the author says is three to five years, the total Fund is expected to perform above the actuarial assumption of 7.5 percent for investment return net of investment expenses.
Based on your experience as the NMDU Fund's actuary, do you have any judgment on the accuracy of this statement in terms of how the Fund's assets were intended to perform?
A. Can you repeat the question again?
(The pending question was read.)
THE WITNESS: No.
Q. Do you have any reason to believe that this statement was inaccurate?
A. No.
Q. Let's now turn to Exhibit 127. These are minutes from a meeting of December 19, 2007 of the NMDU Fund trustees. And it indicates in listing the

Page 1081

Egan - Cross

present individuals, aside from the trustees, it indicates that you attended and Mr. Urbank attended, do you see that?

A. Yes. The entire minutes?

Q. Yes, it's only six pages, and let me tell you why. I'd like you to take a look at the minutes and see if they refresh your recollection about whether you recall attending this meeting. Go ahead. Did you attend this meeting?

A. It looks like I did.

Q. Do you have any reason to believe did you not attend this meeting?

A. No, I have no reason to believe that.

Q. Alright, let's focus on page 2 of the minutes, and the text under a heading that's Roman numeral 5, Consultant's Report. And the second paragraph under Consultant's Report talks but having noted the funding standard account credit balance and how it was performing. Do you see that?

A. Yes.

Page 1082

Egan - Cross

Q. Great. And then you, or the minutes go on to say that should all assumptions be reached, including the 7.5 percent investment assumption, a projection of the funding standard account credit balance shows no deficiency for 30 years, do you see that?

A. Yes.

Q. And then in -- on the next page, on the top paragraph, there is a notation that the Segal representatives then reviewed the valuation relating to the Pension Protection Act, and they noted the Pension Protection Act funded ratio, do you see that?

A. Yes.

Q. Let me ask you this question. In connection with the NMDU Fund, did you have to make annual projections of the funded percentage for Pension Protection Act purposes?

A. Yes.

Q. And that was in order for you to certify what particular zone the Fund would

Page 1083

Egan - Cross

be in for Pension Protection Act requirements, correct?

A. Yes.

Q. And in connection with that work, that annual projection funded percentage, you used 7.5 percent as the discount rate to value the plan's liabilities, correct?

A. Yes.

Q. Does the Pension Protection Act require an actuary to use a particular discount rate to value vested benefits for purposes of zone certification determination?

A. They require you to use reasonable assumptions.

Q. And you chose consistent with that requirement a 7.5 rate, correct, the funding assumption? You chose a 7.5 percent rate? Yes or no.

A. Yes.

Q. Now I'd like you to turn to what's labelled Exhibit C to these minutes, and it's at Fund 3315. This is a chart that compares the funded percentages for

Page 1084

Egan - Cross

the NMDU Fund based on a variety of different objectives, right?

A. Yes.

Q. And did you prepare this chart?

A. Most probably.

Q. You don't have any reason to believe you did not prepare this chart?

A. No.

Q. And you'll notice on the far right columns there are enumerated funded percentages and then on the far left column there is an identification of the different purposes for which the funded percentage is derived, do you see that?

A. Yes.

Q. Okay. And then the footnotes, am I right, explain in more detail what each of these purposes are, is that right?

A. Yes.

Q. So for example to take the first horizontal line which begins zone certification, the funded percentage for zone certification purposes in 2007 is 80.8 percent, is that right?

Egan - Cross

A. Yes.

Q. And this would be the annual zone certification that we just talked about a moment ago required by the Pension Protection Act, correct?

A. Yes.

Q. And am I correct that if you look at the notes, they indicate that for zone certification, annual funding and accumulated liability purposes, you used a 7.5 percent discount rate to value investment returns and liabilities?

A. Yes.

Q. And why was the 7.5 percent figure used for all three of these purposes?

A. Because it's an ongoing plan and it's the long-term assumption.

Q. The long-term return assumption?

A. Yes.

Q. And am I correct that for ERISA reporting and PFEA reporting purposes, you did not use a 7.5 percent investment return assumption, but a 5.81 percent return

Egan - Cross

assumption, correct?

A. Yes.

Q. And where did that 5.81 percent number come from?

A. It was in a range that was -- it was within a range that is promulgated by the government.

Q. So it's dictated by statutory requirements?

A. That it be within a certain range.

Q. And was 7.5 percent in that range?

A. No.

Q. And then finally there is the withdrawal liability measure, and the withdrawal liability measure was calculated using the Segal blend to value liabilities, is that correct?

A. Yes.

Q. And no other of the measures on this page relies on the Segal blend, correct?

A. Correct.

Egan - Cross

Q. So the Segal blend is uniquely applied for the withdrawal liability purpose, correct?

A. Yes.

Q. And the statutory scheme, the relevant statutory scheme does not require use of the Segal blend to value benefit liabilities for withdrawal liability purposes, correct?

A. Say that again? I'm sorry, repeat that?

(The pending question was read.)

THE WITNESS: Yes, does not require, yes.

Q. Alright, let's turn to Exhibit 128. Those are the board minutes for April 17, 2008. And I note again on the first page of those minutes, which is 3099, it indicates that you were present at this board of trustees meeting. Do you have any reason to believe you were not present?

A. No.

Q. Let me draw your attention to

Egan - Cross

page 2 of the minutes under the heading of Roman number four, Consultant's Report, do you see that?

A. Yes.

Q. And why don't you read the fourth paragraph under capital letter A on that page. It begins with regard to investment return, Mr. Lotruglio commented. Why don't you read that. And again Mr. Lotruglio is one of the representatives from the investment advisor, correct?

A. My understanding, yes.

Q. So the minutes indicate that, quote, with regard to investment return, Mr. Lotruglio commented that the investment portfolio was structured to produce a 7.5 percent annual rate of return.

Do you agree with this statement set forth in the minutes? That is do you understand that the investment portfolio for this Fund had been structured to produce a 7.5 percent annual rate of return?

A. That's what it says.

Egan - Cross

Q. You have no reason to disagree with that statement?

A. No.

Q. Let me ask you this. Do you know whether in the case of this Fund, the investment advisor chose the asset allocations to produce a 7.5 percent annual rate of return, or they chose the asset allocations based on other factors and then you used those allocations to develop your 7.5 percent assumed rate?

A. I don't know why they do what they do.

THE ARBITRATOR: Who does? You said they.

A. I don't know why the investment advisor does what they do.

Q. So just to clarify the record, let me ask this clarifying question.

You are not aware of how the investment advisor for this Fund went about and what objectives it had in determining the asset allocation classes for this Fund?

MR. RICHMAN: Objection. It

Egan - Cross

assumes that they determined it.

THE ARBITRATOR: He's right.

Q. In your experience with the NMDU Fund, asset allocation classes are selected, correct?

A. You would think so.

Q. Do you have any reason to think -- you were the actuary, you attended --

A. Repeat the question, please.

Q. Do you have any reason to believe that asset allocations were not selected for this particular Fund?

A. I have no reason to believe that they were not selected, but I don't know by whom.

Q. You don't know whether the investment advisor selected it or the trustees selected them based on the advisor's recommendation, correct?

A. Correct.

Q. In your experience however, investment advisors at the least make recommendations about asset classes for multi-employer pension funds, correct?

Egan - Cross

MR. RICHMAN: Objection, asks for an expert witness opinion. In her experience?

THE ARBITRATOR: I don't think that's asking for an expert opinion, it's asking for what her personal experience is.

MR. RICHMAN: She's not an expert, and opinion is not relevant.

THE ARBITRATOR: Well, this is going to a factual question. Go ahead.

THE WITNESS: I've seen it many different ways, where the trustees select whether they ask recommendations from the advisors. I've seen it all different ways.

Q. Now let's turn to Exhibit D, and it begins on page 3316. A memo from you and Mr. Urbank to the trustees of the NMDU. Ms. Egan, are you there?

A. Yes.

Q. So the minutes indicate that you prepared, and you and Mr. Urbank presented this memo to the Fund trustees at this

Egan - Cross

April 17, 2008, meeting. And I want to draw your attention to page 2 of this memo. And can you please review the very last paragraph on page 2.

A. Okay, yes.

Q. This last paragraph indicates that you and Mr. Urbank had recommended that the trustees establish three potential investment scenarios in connection with certain Pension Protection Act projections that you were going to make. One was called a pessimistic and then another an optimistic and then the third was a baseline scenario, do you see that?

A. Yes.

Q. And the baseline scenario it states was a 7.5 percent investment return baseline, do you see that?

A. Yes.

Q. And that in addition, this investment assumption was going to be an assumption to apply over either both of the next five or ten years, do you see that?

A. Yes.

Page 1093

Egan - Cross

Q. And these various investment scenarios were going to allow the trustees after you had done some modelling to review potential future funding levels for the plan, right?
A. Yes.
Q. So you suggested according to these minutes that the baseline return for this exercise be a 7.5 percent return, correct?
A. Yes.
Q. And in addition you suggested a five-year or a ten-year investment return modelling period, correct?
A. Yes.
Q. Why did you recommend 7.5 percent as the suggested baseline return for a possible five-year and possible ten-year modelling period?
A. It's a funding assumption. It's just to start off somewhere, to show what the valuation is showing. Illustration.
Q. And you said a moment ago that your funding assumption is a long-term

Page 1094

Egan - Cross

assumption.
A. Yes, it is a long-term assumption.
Q. But for these modelling purposes you believed it was appropriate to have as a baseline for a five-year modelling period 7.5 percent, correct?
A. It it's just basically to start somewhere. You're taking the valuation and putting it out there, and this is where you are based on the valuation. Then we're suggesting to go above and below it to see sensitivity against the valuations -- to see the sensitivity above and below the valuation assumptions.
Q. But nonetheless you thought 7.5 percent was an appropriate baseline for this model.
A. It's just the valuation assumption. We're just starting with the valuation assumption. It's a place to start. Numbers they already had.
Q. Was there in your judgment any other place to start?

Page 1095

Egan - Cross

A. The next step is to look at better and worse.
Q. No, I'm sorry, in connection with the baseline, in your judgment was there any other appropriate place to start a five-year investment return modelling project than 7.5 percent?
A. We were suggesting to do the valuation assumption plus two more. The valuation assumption was already there. Start there and then do two more, better and worse.
Q. Let me see if I can wrap this up with one final question. For purposes of a baseline for a five year modelling analysis, you recommended the 7.5 percent funding assumption, correct? Yes or no?
A. To start somewhere. Illustratively to start somewhere. That is what the baseline is, is a place to start. And you already had those results. No need to do extra work, a place to start.
Q. And the baseline would be relative to a more optimistic assumption

Page 1096

Egan - Cross

and a more pessimistic assumption, correct?
A. I'm not sure what the question is. I'm not sure I understand what you're asking.
Q. Let's turn to Exhibit 133. And these are minutes of a board of trustees meeting of December 16, 2009, and it indicates on the first page of the minutes, Ms. Egan, that you attended? I assume you have no reason to believe you didn't.
A. No.
Q. Let's turn to page 2, and let's draw your attention to the discussion under section 5, which is entitled the Segal Company, the Segal Company Discussion.
Alright, four paragraphs into the discussion under B, which is therefore on page 3, there is a paragraph that began, Ms. Egan next commented, do you see that?
A. Yes.
Q. Why don't you read that paragraph.
A. To myself?
Q. Yes.

Egan - Cross

A. Okay.

Q. So this paragraph indicates that you had done a projection on the funding standard account, correct?

A. Yes.

Q. Alright, let me ask a couple of foundational questions here. All multi-employer plans need to maintain the funding standard account, correct?

A. Yes.

Q. Right, and it's not an actual subaccount of the trust, it's just a bookkeeping account, correct?

A. Yes.

Q. And the calculations concerning a funding standard account determine whether there needs to be a minimum amount of contributions to that pension plan under the Internal Revenue Code, agreed?

A. Yes.

Q. So continuing to read the minutes in this paragraph, it states that you advised that, quote, the credit balance will be depleted in the plan year ending

Egan - Cross

May 31, 2017, assuming future market value rates of return of 7.5 percent. Do you see that?

A. Yes.

Q. And thus this discussion indicates that you had modelled future Fund performance in order to determine whether and when the funding standard account would run a deficit and thus require contributions, correct?

A. Under that one scenario, yes.

Q. And in undertaking this modelling, you assumed that for each year, including and after 2009, the Fund would earn a 7.5 percent return, correct?

A. Yes.

Q. And your results showed that after eight straight years of a 7.5 percent compounded return, there would be as of the plan year ending May 31, 2017 a deficit in the funding standard account, correct?

A. Yes.

Q. Okay, let's turn to Exhibit E to these, and that begins at Fund page 3345.

Egan - Cross

Alright, this is a memo from you and Mr. Urbank to the board of trustees, and it discusses zone certifications and certain modelling scenarios that you had undertaken in order to project zone status. Do you agree with that?

A. Yes.

Q. Okay, and did you prepare this memo?

A. Yes.

Q. And let's take a look at the second paragraph of the memo. It begins with the words although the trustees elected to free.

A. Yes.

Q. So this paragraph indicates that assuming all assumptions are met, including a market rate of return of 7.5 percent, there was a projection that by May 31, 2010 the Fund was expected to be seriously in danger. Do you see that?

A. Yes.

Q. So this memo was prepared in November of 2009?

Egan - Cross

A. Yes.

Q. And am I therefore correct that in November of 2009, Segal made a projection about what the Fund's zone status would be as of the end of that current plan year?

A. Yes.

Q. Okay, and for purposes of making the projection for that current plan year, Segal assumed a 7.5 investment return. Yes or no?

A. It was an illustration, yes.

Q. So the answer to my question is yes?

A. Yes.

Q. Now let's turn to page two.

A. Same memo?

Q. Yes, same memo, thank you. And why don't you read the paragraph immediately after the chart on page two.

I'm sorry, I'm going to ask you to focus on the first sentence to move this along. The first sentence indicates that the projections in the chart above about

Page 1101

Egan - Cross

zone status in the future were made assuming that the plan, quote, will experience a market rate of return of 7.5 percent each year into the future. Do you see that quote?
A. Yes.
Q. So am I correct that Segal thought it appropriate in projecting future zone status that this plan would return 7.5 percent on its assets for each year in the future?
A. It was an illustration that if you got seven and a half percent, this is the result you would get.
Q. But Segal determined to use the 7.5 percent investment return assumption for purposes of this illustration model, correct?
A. This one illustration.
Q. That's a yes?
A. Yes, for this one illustration.
Q. Now let's take a look at Exhibit 137. They are the minutes -- and again, it indicates in the first page that

Page 1102

Egan - Cross

you attended that meeting. I assume there is no reason for you to believe that's inaccurate?
A. Right.
Q. Okay. So let me draw your attention to the narrative under Roman numeral 2, discussion of funding improvement plan, and then very first paragraph indicates that Mr. Urbank made a presentation about the pension plan's zone status and he reminded the trustees that based on the actuarial valuation as of June 1, 2010 the Fund was in seriously endangered status. And then he indicated that for this funded status purpose among the assumptions was that you took a 7.5 percent investment rate of return assumption into account, correct?
A. For that document, yes.
Q. That document being the determination of zone status for June 1, 2010?
A. I guess whatever is Exhibit A.
Q. Unfortunately, there is no

Page 1103

Egan - Cross

Exhibit A.
A. It's referring to Exhibit A, so I don't remember exactly what was Exhibit A. So it's hard to answer.
Q. Sorry. The reference to Exhibit A is to a Segal report on funding improvement plan projections. The reference to the determination of serious endangered status as of June 1, 2010 in this narrative is independent of the reference to Exhibit a A.
A. Okay, let me just read it again.
Q. Take your time. I think the clue there is the language he reminded the trustees.
A. So seven and a half percent was used for that purpose of the zone certification.
Q. So let me ask you to confirm that.
A. Okay.
Q. For purposes of determining the zone status of this fund, as of June 1, 2010, you had used an investment rate of

Page 1104

Egan - Cross

return assumption of 7.5 percent, correct?
A. Yes.
Q. Okay, thank you. Now I'm going to turn to a series of questions about the first issue in this case, contribution base units. Alright, let's turn our attention back to an earlier set of minutes. Let's turn to Exhibit 128.
A. Okay.
Q. Do you have any reason to believe you did not attend this meeting of the trustees which is on April 17, 2008?
A. No.
Q. Okay, let me draw your attention to page 3 of the minutes. There is a discussion near the top of a motion by the trustees in connection with certain assumptions to be used for Pension Protection Act status and education purposes, and then there is a discussion about contribution of rate change information, that's the paragraph near the top that begins with regard to, okay, do you see that?

Page 1105

Egan - Cross

A. Yes.

Q. Okay. So this page of the minutes and this note indicates the union trustees in their capacity as union officials agreed to provide Segal with a schedule of future contribution rate changes by employer, do you see that?

A. Yes.

Q. To your knowledge was that information ever provided?

A. I'm not sure how detailed it was provided. It might not have been by employer, it might have been just big picture.

Q. Do you recall receiving some form of future contribution rate information from the union officials?

A. I don't remember exactly what was received for this purpose.

Q. You don't remember one way or the other?

A. No. I can't picture it.

Q. I'm now going to draw your attention to Exhibit C of these minutes.

Page 1106

Egan - Cross

It begins at page Fund 3319. And this is a memo from Mr. Urbank and you to the board of trustees dated April 17, 2008. Take a moment to look at this memo and then let me know whether you drafted this memo or approved this memo.

A. Yes.

Q. Yes, you --

A. I finished looking at it, and yes, I was probably involved in this memo.

Q. You were involved in the preparation of this memo?

A. Yes.

Q. Okay. Can you turn to paragraph 4, and in the last sentence in paragraph 4, you see it refers to, quote, contributions are a percentage of wages, do you see that?

A. Yes.

Q. So am I correct that in this memo you chose to characterize the contributions to this Fund as a, quote, percentage of wages, correct? Yes or no.

A. It was written that way, yes.

Q. And you either wrote it or

Page 1107

Egan - Cross

approved it, yes?

A. Yes.

Q. Let's turn to Exhibit 130, those are minutes from December 9, 2008. Do you see those minutes?

A. Yes.

Q. Okay. And again it indicates in the minutes that you attended and I assume you did, or there's no reason to believe you didn't?

A. Correct.

Q. Alright. And let's turn to the discussion on page 3, under heading 7, the Segal Company.

A. Okay.

Q. And in particular paragraph A. And let me just get right to the question at hand. In the last sentence of that paragraph, it indicates that Segal needed in order to proceed with certain studies for Pension Protection Act purposes input from the trustees for among other things contribution rates. Do you see that?

A. Where are you?

Page 1108

Egan - Cross

Q. I'm sorry, I was focusing on the last sentence in paragraph 7A at the top of page 3. I'm sorry, I was moving too quickly.

A. I'm sorry, I'm slow. Okay.

Q. So you agree that the minutes indicate that Segal required input from the trustees on, among other things, contribution rates?

A. Yes.

Q. Did the trustees or anyone else on behalf of the Fund provide Segal with the contribution rates that were requested?

A. I don't remember what was provided here for this purpose.

Q. You don't know one way or the other?

A. This is for live modelling and it's provided at the point of the modelling, so people say if the contribution rate goes up 10 percent, let me see what it looks like, and we plug in what if it goes up 10 percent. If the investment return goes down to negative two

Page 1109

Egan - Cross
percent, what does it look like, and we plug in that. That's the input we need to do.
Q. And do you recall in connection with this live modelling getting that input on contribution rates?
A. At the point of the modelling they asked us to try different things. And I don't remember exactly what different scenarios they asked us to do, but they gave us direction as to what to plug in.
Q. Let's turn to Exhibit 131. Okay, I want you to turn to Exhibit H in this set of minutes from August 5, 2009, 131, and Exhibit H is found at page 03330.
A. What section am I in?
Q. Exhibit 131, at the top it says Exhibit H, at the top on the right, do you see that?
A. Yes.
Q. Okay, good. This is a memo from you and Mr. Urbank to the board of trustees dated August 5, 2009, correct?
A. Yes.

Page 1110

Egan - Cross
Q. And did you prepare this memo?
A. Most probably.
Q. And do you have any reason to believe you did not present on this memo at the trustee meeting of August 5, 2009?
A. I'm not sure. It's not in the minutes.
Q. Maybe this will refresh your recollection. Turn to page six, and under the heading Roman 9, Segal Company Report, look at the second paragraph. It says that you and Mr. Urbank distributed and reviewed.
A. Yes, so then we probably did.
Q. Okay. So the first paragraph indicates that Segal had been making zone status certification projections, and those projections were based on certain assumptions and it identifies key assumptions such as active participants and annual wage increases, do you see that?
A. Yes.
Q. There was no assumption made about shifts to be worked in the future,

Page 1111

Egan - Cross
correct?
A. No.
Q. And that's because Segal did not calculate future contributions by projecting a number of expected shifts and multiplying that expected shift number by a per shift wage rate, correct?
A. Correct.
Q. All right, let's turn now to Exhibit 134. And why don't you turn your attention to the document that's got at the top of it, Exhibit F. And it begins at page 3356. It's a May 19, 2010 memo from Mr. Urbank and you.
A. Yes.
Q. Alright, did you prepare this memo?
A. Probably, yes.
Q. And why don't you turn your attention to page 2 of the memo and the paragraph that's numbered paragraph 4, projected industry activity.
A. Okay.
Q. And take a look at the last

Page 1112

Egan - Cross
sentence.
A. Okay.
Q. So again, you chose to use as the terminology to describe contributions to this Pension Fund contributions being a percentage of wages, correct?
A. Yes.
Q. In that last sentence respecting projected industry activity, you also asked the Fund to provide you in connection with modelling you were doing with, quote, expected wage increases in future years. Do you see that?
A. Yes.
Q. And then you go on to say since contributions are a percentage of wages, do you see that?
A. Yes.
Q. In connection with this Fund, to use your words in this memo, since contributions are a percentage of wages, you would need to know how future wages might increase in order to project future contributions, correct?

Page 1113

Egan - Cross
A. Yes.
Q. Alright, now let's turn to Exhibit 137. And these are meeting minutes of February 15, 2011. Do you see that?
A. Yes.
Q. And on page 1 it indicates that you attended and Mr. Urbank attended and it also indicates that two others of your colleagues from the Segal Company attended in meeting, Mr. Lehman and Mr. Santasiero?
A. Yes.
Q. Do you remember this meeting?
A. There were a couple where they attended, so I don't know if I remember this specific one.
Q. But again there is a foundational question. You have no reason to believe --
A. -- that I wasn't there, no.
Q. Alright. I want you to turn your attention to the first exhibit behind the minutes and that's an exhibit that begins at page 3366.
A. Yes.
Q. Okay, and take a minute to look

Page 1114

Egan - Cross
at this exhibit.
A. Okay.
Q. This exhibit looks to be like a slide deck or a PowerPoint presentation, is that correct?
A. That's what it looks like.
Q. And did you prepare this document?
A. I most probably was involved.
Q. You were involved in the preparation of this document, correct?
A. Yes.
Q. And turn to page 4 of this document, slide 4, it's Fund document number 3370. And at the top of that page there is a heading, it refers to eight percent CR allocation increasing to 11.5 percent, do you see that?
A. Yes.
Q. And what does CR stand for?
A. Contribution rate.
Q. So this slide discusses essentially a funding improvement plan option or schedule in which the Fund's

Page 1115

Egan - Cross
contribution rate would move from eight percent to 11.5 percent, correct?
A. The portion of the contribution rate that was 8 percent becomes 11.5 percent.
Q. But it says eight percent contribution rate, correct?
A. Allocation.
Q. And then it says in the first bullet point, reflects current contribution rate of eight percent of wages?
A. Allocation.
Q. And what is your understanding of the word allocation?
A. That the contribution rate is eight percent of the wage rate, and the portion that's a percentage is the eight, the allocation to the wage rate is the eight.
Q. But you didn't use the term wage rate, did you?
A. No, but that's what it's meant to mean.
Q. You meant it to mean wage rate?

Page 1116

Egan - Cross
A. Yes.
Q. In connection with the February 15, 2011, meeting, did you present to the trustees and go over with the trustees this document?
A. Most probably.
Q. You don't have any reason to believe you didn't?
A. Right, correct.
Q. Did you explain to them what you had meant by allocation?
A. I don't remember specifically what I explained.
Q. Alright, let's turn to slide 12, which is on page 3378. And I want to draw your attention to the bullet points under scenario two and scenario three. Do you see those?
A. Yes.
Q. So scenario two, the third bullet point talks about eight percent, I guess that's contribution rate with reallocation increases contribution rate to 10 percent, do you see that?

Page 1117

Egan - Cross
A. Yes.
Q. And then under scenario 3, eight percent contribution rate with reallocation increases the contribution rate to nine percent.
A. Okay.
Q. What did you mean by reallocation?
A. I don't know that it meant anything different than what the other meant.
Q. But nonetheless you used the word reallocation as opposed to allocation?
A. Yes, it says that there, yes.
Q. I want to draw your attention back one slide to slide 11, which is 3377. Excuse me, and I want to talk to you about the bullet that begins projected contributions based on average contributions. Do you see that bullet?
A. Yes.
Q. And I notice that you used the phrase in this bullet, average wage/contribution, do you see that?

Page 1118

Egan - Cross
Wage/contribution?
A. Yes.
Q. So I want to ask a couple of questions about the relationship between wages and contributions. Under this Pension Fund if an employer increases the total wages it pays to its employees, it also would increase the contributions it pays to the Pension Fund, correct?
A. Yes.
Q. So in this Fund there is a direct correlation between increases in wages and increases in contributions, yes?
A. Yes.
Q. And given this direct correlation between wages and contributions, you used this formulation of one word wage/ contribution in the memo or in this PowerPoint because the concepts of wages and contributions moved together, correct?
A. I don't know if that's why we used it, but the wages and contributions do move together.
Q. Does anything on this slide

Page 1119

Egan - Cross
mention shift numbers and expected shifts?
A. No.
Q. And there is nothing in this PowerPoint document at all that mentions shift numbers or projects expected shifts, correct?
A. It doesn't project expected shifts and it doesn't use wages to project either.
Q. But I asked you about shifts so why don't you answer my question.
A. Okay.
Q. Mr. Richman can ask you questions.
A. Sure, yes.
Q. So let me clarify the record. There is nothing in this PowerPoint presentation that mentions shift numbers or projects expected shifts, correct?
A. Correct.
Q. Okay, so sticking with Exhibit 137 and turning to the minutes, I want to draw your attention to, on page 2 of the minutes, and it's the very last

Page 1120

Egan - Cross
paragraph. So the very last paragraph begins the Segal representatives then conducted an interactive presentation modelling a series of scenarios based on various assumptions as well as various contribution rates, do you see that?
A. Yes.
Q. And this is the, again, just to confirm for the record, the minutes of the February 15, 2011 trustee meeting. So this notation in the minutes, this notation will lead to that interactive live modelling presentation that you previously referred to in your testimony, correct?
A. Yes.
Q. Okay, so this was the presentation in which I guess trustees suggested different contribution rates that were modelled, correct?
A. Yes.
Q. And in connection with their offering up different contribution rates, the trustees asked you to model different projections of future shifts?

Egan - Cross

A. No.

Q. Alright, now let's turn to Exhibit 138. This is a meeting on April 6, 2011. And the first page of the minutes, Ms. Egan, indicates that it was largely -- it was a special meeting and it was largely to discuss a funding improvement plan.

A. Yes.

Q. Okay. I want to draw your attention to the slide deck of the PowerPoint presentation that follows these minutes that begins on page 3386. And in order to move this exam along, you'll see that as part of Exhibit 139 and as part of Exhibit 143, there are also PowerPoint presentations.

THE ARBITRATOR: Where are we now?

Q. We were on 138 and I also asked her to take a look at the PowerPoint presentations behind 139, Mr. Arbitrator, and 143. And my question was did these slide decks use the same terminology respecting contributions and contribution

Egan - Cross

rates that we discussed in connection with the PowerPoint for the February 15th on 2011?

A. Most probably.

Q. Anything else to add to that answer?

A. No.

Q. Let me ask you this. Isn't it true that in discussing contributions and the contribution rate for this Fund with the trustees, your practice was to characterize the contribution rate as either a percentage or a percentage of wages?

A. Yes.

Q. And isn't it also true that you employed this practice of characterizing the contribution rate as a percentage or a percentage of wages over a multi-year period?

A. Most probably.

Q. That's a yes?

A. Yes.

Q. And this was a practice that not

Egan - Cross

only did you employ, but Mr. Urbank also employed it in connection with this Fund, correct?

A. I cannot speak for him.

Q. Do you have any reason to believe he did not?

A. Not really.

Q. And isn't it also true that Mr. Urbank would take the lead for the Pension Fund in drafting trustee minutes, correct?

A. Yes.

Q. And in connection with the effort to prepare minutes, he too employed this practice of referring to the contribution rate as either a percentage or a percentage of wages, correct?

A. It appears that way.

Q. Do you have any reason to believe that was not the case?

A. No.

Q. And he too employed this practice over a number of years, correct?

A. I would assume so.

Egan - Cross

Q. And the trustees of the Fund routinely would listen to the Segal team characterize the contribution rate as either a percentage or a percentage of wages, correct?

MR. RICHMAN: Objection as to what the trustees would do. Argue that.

THE ARBITRATOR: Sustained. They were in the room, and they spoke it, and you can argue whether they heard it.

Q. Let me ask you this. Isn't it true that you also employed a practice of referring to the plan's contributions as a percentage of wages?

A. I'm not sure.

Q. You're not sure?

A. No.

Q. Why don't we turn to Exhibit 150. And why don't you turn to Exhibit A, it begins at page 3437. This was an exhibit to the trustees meeting of June 20, 2014. This is a memo from you and Mr. Urbank to

Egan - Cross

the board. It's dated April 4, 2014. Do you see that?

A. Yes.

Q. And let me draw your attention to the first paragraph, and in the middle of the first paragraph there is a sentence that begins with the word assuming, do you see that? Assuming that all employers?

A. Yes.

Q. Okay, and in this paragraph it refers to contribution rate increases from eight percent to 11.8 percent of the shift rate, do you see that?

A. Yes.

Q. Did any of the prior memoranda that you had prepared to the board of trustees use that formulation, percent of shift rate?

A. Not that I recall.

Q. And this memorandum was prepared after the assessment of the withdrawal liability against The New York Times, correct?

A. I think so.

Egan - Cross

Q. And it was prepared after The New York Times had challenged the assessment on the ground that it misstated contribution base units, correct?

A. Say that again.

Q. And this memorandum was created after The Times had challenged the assessment on the ground that the assessment and determination of partial withdrawal liability had misstated contribution base units, correct?

A. Yes.

Q. Did that withdrawal liability dispute play any role in your and Mr. Urbank's decision to change the wording about contribution rate?

A. It may have.

Q. You don't remember one way or the other?

A. It made me revisit how we phrase it.

Q. So it did play a role?

A. Yes.

Q. And in deciding to make this

Egan - Cross

change, did you consult with any of the trustees beforehand?

A. No.

Q. Did you consult with anybody at the Fund beforehand?

A. No.

Q. Did you and Mr. Urbank consult with anybody at Segal before you made this change?

A. I don't remember.

Q. Now I want to talk briefly about withdrawal liability matters and their coming to the attention of the trustees. You served as a Pension Fund actuary through 2014, is that correct?

A. I don't remember exactly when we were terminated.

Q. But approximately the end of 2014?

A. I don't remember, somewhere into that.

Q. In the 10-year period from 2005 through 2014, how many employers actually withdrew from this Fund and you prepared

Egan - Cross

withdrawal liability assessments?

MR. RICHMAN: Objection, we went through this the first time around in great detail, which if I remember correctly you pleaded with me not to go through every one of them.

MR. MILLER: I will withdraw the question. That's quite alright, the documents will speak for themselves.

THE ARBITRATOR: Fine. Thank you.

Q. Let me ask this question, which I'm pretty confident was not raised earlier. How many times in the 10-year period from 2005 to 2014 did you discuss withdrawal liability issues at trustee meetings?

A. I don't remember how many times.

Q. It was infrequently, correct?

A. I don't remember how often.

Q. Do you remember back in February in this matter testifying about a Fund contributor named El Diario?

A. Yes. This year?

Page 1129

Egan - Cross
Q. Yes, when you testified earlier this year in this proceeding.
A. Yes.
Q. Prior to your giving that testimony, did you meet with attorneys from Schulte Roth to prepare for that testimony?
A. Probably.
Q. Do you have any reason to believe you didn't?
A. No.
Q. Did you review any documents in connection with preparing for that testimony back in February?
A. I don't remember.
Q. Did you review any documents in preparing for that testimony that discussed or made mention of El Diario?
A. I have no idea. I don't remember.
Q. Did you review any trustee minutes that referenced El Diario?
A. I have no idea.
Q. Did you discuss with the Schulte Roth attorney El Diario and El Diario's

Page 1130

Egan - Cross
participation in the Fund?
MR. RICHMAN: Objection. That's privileged.
MR. MILLER: Schulte Roth is not counsel for the witness. There is no indication of a mutual defense agreement. And beyond that, even to the extent that there may be some privilege here, and we don't think there is, obviously I'm asking these questions as it relates to prior conduct and the issue of sanctions, and in connection with that issue, I don't think that the privilege here to the extent it exists is sufficiently strong to prohibit my asking questions about the extent to which this was discussed.
MR. RICHMAN: There is a privilege. They were the actuary to the Fund, and that privilege carries over to the Fund and our representation of the Fund. With respect to this ridiculous notion of

Page 1131

Egan - Cross
sanctions, I will remind everybody that it was your opinion that said that they hadn't asked for documents relating to contribution base units, and this would be a document that would fall within that range. They can argue whatever they want, we're not waiving privilege.
MR. MILLER: It mischaracterizes your order, because the fact is that we asked about contribution base units. Your order related to the question of the contribution rate.
MR. RICHMAN: It never asked about contribution rates.
MR. MILLER: And obviously these minutes address contribution base units. I think your opinion was clear that notwithstanding the other sets of minutes, these minutes were clearly relevant and should have been provided. I take the position that as it relates to the existence of the privilege, while there may be a

Page 1132

Egan - Cross
privilege that extends to the actuary in connection with decisions about legal advice to give to the trustees, the preparation of this witness for testimony falls outside of that scope. And again beyond that point, I don't think it holds up in connection with the issue that we're trying to make factual here.
MR. RICHMAN: I've been through lots of it these arbitrations, and I'm happy to brief this issue. I have never heard of anyone asserting that there is no privilege between a witness service provider and the counsel representing the Fund, not only in giving advice to Fund trustees, but in preparation for an arbitration.
MR. MILLER: The only other thing I'd add is at the time she gave her testimony and she was prepared for the testimony, she technically was no longer a service provider.

Egan - Cross

MR. RICHMAN: But she was testifying about services she provided to the Fund.

THE ARBITRATOR: Okay, I have to acknowledge that I have never dealt with an issue of privilege as it relates to requests for sanctions. This is a new wrinkle.

Let me ask you this. Let's posit for a moment that you had full discussions with people in that time frame about El Diario. How would they be able to establish that fact?

MR. RICHMAN: First of all I don't think it's relevant. But the answer is what time period are you talking about?

THE ARBITRATOR: Prior to February of 2015. Her prior testimony.

MR. RICHMAN: And you want to know how would they establish the fact of whether --

THE ARBITRATOR: Let's posit

Egan - Cross

that the Fund was fully aware before there was a production request that they had this El Diario information and they said we're not going to turn it over. We're going to use it just at the hearing to surprise them.

MR. RICHMAN: Well, there are two things to that. And one, I just want to make sure I'm right on my facts. What was not produced were the minutes. And the -- even if we had the discussion with her, it would have been a rebuttal to Mr. Hayes' testimony.

THE ARBITRATOR: I'm not suggesting necessarily that you had the discussions and hence the sanctions are appropriate. I'm just asking about how you establish a factual predicate for an argument if you can't ask the question about whether it was discussed.

MR. RICHMAN: Well, whether it was discussed is -- there was an

Egan - Cross

estimate that had been turned over to them.

THE ARBITRATOR: And that goes to the merits of whether or not I think there was anything done in bad faith and the sanctions.

MR. RICHMAN: But I would be surprised, I quite frankly don't remember that there was any discussion about the estimate that was turned over, because we turned over all the withdrawal liabilities.

MR. MILLER: We can show you the estimate. It made no reference to shifts, which is why the minutes were important. And second, you hit the nail on the head. Without answering the question that I probed, there would be no ability on the part of The New York Times to make a relevant fact inquiry as to whether the information contained in those minutes was used to prepare this witness for purposes of surprise testimony.

Egan - Cross

THE ARBITRATOR: Well, I don't want to call this witness back. I will allow you to answer the question and we can brief it if need be.

MR. RICHMAN: What's the question?

THE REPORTER: "Did you discuss with the Schulte Roth attorney El Diario and El Diario's participation in the Fund?"

MR. RICHMAN: That's an inappropriate question. You -- as I understand what you are saying, is whether there was a discussion with the witness with respect to the minutes about El Diario. That was what was not turned over in the initial discussion.

MR. MILLER: No, because there remains the possibility that the minutes themselves were not discussed. The minutes were not shown to the witness, but the text, the language of the minutes was in fact orally

Egan - Cross

discussed with the witness to refresh her recollection and prepare her for what you have dubbed surprise testimony.

THE ARBITRATOR: Go ahead. You can have your question. Go ahead.

THE REPORTER: "Did you discuss with the Schulte Roth attorney El Diario and El Diario's participation in the Fund?"

THE WITNESS: When?

FURTHER EXAMINATION BY MR. MILLER:

Q. In preparation for your testimony in February.

A. I don't remember exactly.

MR. MILLER: Mr. Arbitrator, let's do the following. Can we take a short break? I think I'm basically done. We'll discuss this issue and see if there is any necessary followup. If there will be followup, I will anticipate it will be just a couple of minutes.

(Recess taken: 4:01-4:13 p.m.)

Egan - Cross

FURTHER CROSS-EXAMINATION BY MR. MILLER:

Q. Ms. Egan, I'm going to read you an excerpt from your prior testimony on February 24, 2015, and I'm going to ask you if that refreshes your recollection about whether El Diario was discussed in preparing for that testimony. So what I'd like you to do is turn to tab two of the hearing transcript that I handed to you, and then turn to page 636 of the hearing. Are you there?

A. Yes.

Q. I'm going to begin at line 5 and read a series of questions and answers into the record.

"Question: Now, was the El Diario estimate ever discussed at a Pension Fund meeting?

"Answer: I believe this one was discussed at a Pension Fund meeting.

"Question: Do you know what the nature of the discussion was?

"Answer: We reported the calculation was done.

Egan - Cross

"Question: Okay, and was there any discussion at the meeting other than your report?

"Answer: My recollection is that after our report, there was further discussion of the possibility of El Diario incurring a partial withdrawal liability, possibility of it.

"Question: And what was the nature of that discussion?

"Answer: I think there was a discussion about what partials are, and how partials could be -- and mentioned -- part of the discussion was that you need to track shifts to see if there is a 70 percent decline in the base units to see if a partial possibly occurred.

"Question: Were you given the assignment to track, to determine whether partial withdrawal occurred?

"Answer: No.

"Question: Who was given that assignment?

"Answer: I don't know if

Egan - Cross

anybody, anyone was given the assignment to determine whether it occurred. I think it was just noted that the shifts need to be kept track of to see if there is a possibility."

Ms. Egan, does this testimony refresh your recollection of whether in preparing for the testimony you discussed El Diario with the Schulte Roth lawyers?

A. I don't remember if I discussed it with the Schulte Roth lawyers.

Q. Let me ask you an additional question. Turn to the yellow binder. And Exhibit 140, which are the minutes from Tuesday, October 11, 2011, and page 4 of the minutes, which discuss under heading 8 the El Diario withdrawal. Are you there?

A. Yes.

Q. Okay, and take a look at the second paragraph under A. We're looking at Exhibit 140 of the binder, and it's page 4 of the minutes, El Diario. And we're looking at the second paragraph under A, the one that begins following the

Page 1141

Egan - Cross

discussion, do you see that?
A. Yes.
Q. And then it says it was noted, it uses that phrase, it was noted that due to the reduction in shifts rather than a complete withdrawal there may be partial withdrawal. As a result the Fund Office, and then it uses the language will track shifts, okay? Now let's look at your testimony. And the answer that you gave on the bottom of 636 beginning at line 22, you also used the phrase, part of the discussion was that, quote, you need to track the shifts, and then again in the answer you gave on page 637 beginning at line 12, you said, I think it was just noted that the shifts need to be kept track of. So in those two answers, you used language that was almost precisely the same as the language in that paragraph in the minutes.
A. But that's what you do for partial withdrawals, is you track the shifts.

Page 1142

Egan - Cross

Q. Well, let me ask you --
MR. RICHMAN: Let her finish her answer.
Q. Are you done?
A. I guess so.
Q. So looking at the language in the minutes, again, it does not refresh your recollection one way or the other whether you had a discussion about El Diario in preparation for your testimony?
A. I don't remember exactly when my discussions were, with whom, when, about what.
Q. And do you think it's just essentially coincidence that you used language --
MR. RICHMAN: Objection.
THE ARBITRATOR: Let him finish the question. Go ahead.
Q. You think that it is essentially coincidence that in connection with two of the answers you gave, you used language that is the same as the language in the minutes?

Page 1143

Egan - Cross

MR. RICHMAN: Objection, it's argumentative, and she's already explained that's how you do it.
THE ARBITRATOR: Okay, it's cross-examination. She can answer that. Go ahead.
THE WITNESS: I should answer him?
THE ARBITRATOR: Yes.
A. That is the typical way to describe that kind of situation. An actuary would describe it that way. If we wrote the minutes, we would describe it that way. I write the way I speak. I would describe it that way.
Q. Using the words track shifts?
A. Yes.
Q. And what about the verb it was noted?
A. I use that all the time. Everything is noted in what we do.
Q. And did you draft the minutes for the October 11th meeting?
A. No.

Page 1144

Egan - Redirect

MR. MILLER: Thank you. No additional questions.
MR. RICHMAN: I do have questions.

REDIRECT EXAMINATION BY MR. RICHMAN:

Q. So Ms. Egan, let's turn to Exhibit 133. And specifically I would like you to look at, from 3346, please, and that will be towards the back.
You say on 3346, or you and Mr. Urbank says in this memo, and it's under the box, the projections are based on the assumption that the Plan will experience a market rate return of 7.5 percent each year into the future. Do you see that?
A. Yes.
Q. Did you believe that it was reasonable to assume that the market return on the portfolio, the Fund would be 7.5 percent each year into the future?
A. We assumed a long-term assumption of seven and a half percent, not that you necessarily get 7.5 each year, but a

Egan - Redirect

long-term assumption of seven and a half percent.

Q. Now, in a lot of the projections you did you made assumptions. You need to make assumptions to do projections, is that correct?

A. Correct.

Q. Okay. And one of the assumptions that you need to do to come up with to make a projection about the funding of a plan -- let me withdraw that, leading.

Can you describe just generally, not full-blown actuarial speak, but just generally the assumptions that you need to assume for this Pension Fund to make projections about its financial condition into the future?

A. There's a lot of assumptions.

Q. Let's talk about the major assumptions.

A. Major assumptions would be -- in the projections would be your investment return into the future, maybe how your contributions will change into the future,

Egan - Redirect

whether your population goes up or down into the future, maybe mortality, how people live or die.

Q. And how does population going up and down figure into the projections?

A. Well, what happens is there are liabilities tied to people and there's money tied to people. Liabilities that are owed and there's money coming in. Both of them are tied to the numbers of people.

Q. And let's talk about the money coming in.

A. Okay.

Q. When you talk about the money coming in, the slideshows that Mr. Miller showed you, you used the phrase contribution rate or percentage of wages. And why did you use that?

A. What did we mean by that?

Q. Yeah, why did you use that to describe the contributions coming into the Fund?

A. The way -- our understanding of how the Fund makes contributions, it's a

Egan - Redirect

percentage of the wage rate times the shift. Since employers have several different types of wage rates and they're at all different shifts, it was always hard to get that kind of information by each employer, so we would focus on the contribution rate, eight percent, which was the easiest way to talk about contributions, so we would talk about that eight percent which sometimes changed to six percent, would go back up to eight percent. So we would focus on the eight percent. It was the easiest way to talk about the contributions.

Q. Let's turn to Exhibit 128, please. And let me ask you, Mr. Miller pointed out that after withdrawal liability was assessed by the Fund against The New York Times, you used a different phrasing, right, for contributions?

A. Yes.

Q. And was it you or Mr. Urbank who decided to use that phrasing?

A. I don't remember exactly how it

Egan - Redirect

came about, but we thought it would be clearer to express it more specifically, since there have been issues.

Q. When you say since there have been issues, what was the issue that had come up?

A. The issue?

Q. I'm going to take the pain and leading and he'll -- so the The New York Times withdrawal liability?

A. Yes.

Q. So as I understand your testimony, correct me if I'm wrong, that you thought it would be clearer since that issue came up?

A. Clearer, yes.

Q. Looking at 138, this is your memo and Mr. Urbank's, I'm on 3320. So this is for zone certification, right?

A. Yes.

Q. And 3320, if you look at paragraph 4, the last sentence says please note that on this point we need an assumption for both the average shifts per

Page 1149

Egan - Redirect

active participant, projected number of active participants and the expected wage increases in future years since contributions are a percentage of wages. Do you see that.

A. Yes.

Q. Why did you include average shifts per active participant in this?

A. Because it was my understanding that the contributions were made by a certain percentage of the wage rate times the shifts per active employee.

Q. Okay. And it was your understanding at the time you wrote this memo?

A. Yes. And this was the first year we were requesting this data.

Q. And did your understanding of the way the contribution obligation of the employers contributing to the Fund, did that understanding change?

A. No.

Q. I'm going to rephrase the question. Did that change at any time that

Page 1150

Egan - Redirect

you were the actuary to the Fund?

A. No.

Q. Can you take a look at Exhibit 138, please.

Now, if you flip past the agenda you'll see the minutes of an April 6th, 2011 meeting.

A. Okay.

Q. And I think you've testified already that there is no reason to doubt that you were there?

A. Right.

Q. And if you'd look at the bottom of page 2, and it's right under the redacted. Do you see where it says redacted, the bottom of page 2, big bold letters?

A. Oh, yes, I see.

Q. It says Mr. Murphy. Who is Mr. Murphy, by the way?

A. He was a -- I'm assuming he was a trustee. I'm not sure if he still is because I'm not involved with the Pension Fund.

Page 1151

Egan - Redirect

Q. So it says Mr. Murphy requested that Segal provide the trustees with a report setting forth the projected contributions based on contribution rates under the default schedule and estimated shift totals through 2020 for the three largest contributing employers to the pension plan. Do you see that?

A. Yes.

Q. And did you have a conversation with Mr. Murphy, let's start with at this meeting about his request?

A. Repeat the question.

Q. Did you have a conversation with Mr. Murphy about his request at this meeting?

A. After the meeting?

Q. No, at the meeting.

A. I don't remember exactly, but I'm assuming he --

Q. No, I don't want your assumption.

A. I'm not sure what the question is.

Q. Mr. Murphy requested, right? You

Page 1152

Egan - Redirect

see that, you see the request he made?

A. Yes.

Q. And I'm asking you, did you have a conversation or discussion with him, and/or the trustees at the meeting about this, his request?

A. I don't remember exactly what the conversation was.

Q. And did you ever get, by the way, the estimated shift totals?

A. I don't remember.

MR. MILLER: Excuse me, in connection with her prior answer, she said I don't remember exactly what the conversation was, if there was.

THE WITNESS: Other than what's written. That's what I --

MR. MILLER: The record is confused.

Q. Alright, so let me see if we can clarify the record.

Mr. Murphy made a request, okay. And in his request he wanted estimated shift totals through 2020 for the three

Page 1153

Egan - Redirect
largest contributing employers for the pension plan, do you see that?
A. Yes, I do see that.
Q. Do you remember that request?
A. I don't remember the details of that, no.
Q. Forget the details. Do you remember that he made this request?
A. I don't remember exactly.
Q. Okay. Do you have any reason to believe that these minutes are not accurate?
A. No.
Q. And was there a discussion between Mr. Murphy and you or anybody else at the meeting about his request for estimated shift totals?
A. I don't know because I don't remember.
Q. I think that clarifies the -- I think we got it nailed down, okay.
And then did you ever get estimated shift totals through 2020?
A. Not that I remember.

Page 1154

Egan - Recross
Q. Do you know why?
A. No.
MR. RICHMAN: We have no further questions.
(Recess taken: 4:37-4:53 p.m.)
RECROSS-EXAMINATION BY MR. MILLER:
Q. Ms. Egan, can you turn your attention to Exhibit 134, and then why don't you turn your attention to Exhibit F to those minutes. 134 is the minutes of May 19, 2010, and there's a letter from -- a memo from you and Mr. Urbank to the trustees. It's at Fund 3356. And this is another data request for a zone certification analysis, correct?
A. Yes.
Q. And if you turn to page 2 of the letter, under paragraph 4 of projected industry activity, you are again asking for information to use in that years's zone status projection, correct?
A. Yes.
Q. And you'll note that in this letter, the 2010 letter, in the last

Page 1155

Egan - Recross
sentence, you do not ask for average shift per active participant, correct?
A. Yes.
Q. Now let's turn to Exhibit 144. Those are the minutes of the July 30, 2013 meeting. Okay, and let's turn to an exhibit to those minutes. It's the same data request letter that begins at Fund 3434. Are you there?
A. Yes.
Q. Okay, and if you turn to page 2, on paragraph 4, projected industry activity, the last sentence, once again, you do not ask for average shift per active participant information, correct?
A. Correct.
Q. Alright, and then finally let's turn to Exhibit 150. And take a look at -- it begins at page 3440. And let's look at that year's iteration of the data request. Again look at page 2 under the Projected Industry Activity heading, and once again, you are no longer seeking average shift per active participant data, correct?

Page 1156

Egan - Recross
A. Yes.
Q. And the reason I take it that you no longer sought that information following the letter in 2008 was that you never received estimated shift total information, correct?
A. We realized we don't need it.
Q. You realized that you did not need estimated shift -- projected shift information in order to project future contributions, correct?
A. Yes.
Q. In the testimony you gave with Mr. Richman, he asked you about certain basic assumptions that you as an actuary make in projecting the future performance of the Fund. And you indicated in response to that question that you seek typically information on the number of participants because that can affect assets and it can also affect liabilities. And in fact I think the phrase you used was liabilities are tied to people. Do you remember that testimony?

Page 1157

Egan - Recross
A. Yes, I think I just said it.
Q. Correct, testimony before Mr. Richman.
A. I think I remember.
Q. Isn't it true that in connection with this Pension Fund, participants earn annual -- isn't it true that in connection with the NMDU Fund, participants accrue and earn pension credits annually by reference to the shifts that they work?
A. I believe pension credits are based on shifts.
Q. And isn't it true that in order to earn a year of pension credit under this plan, you need a hundred shifts?
A. I don't remember exactly how many shifts you need to earn a pension.
Q. But again to confirm, but you need shifts to earn pension credit, correct?
A. Yes.
Q. And therefore shift information would be helpful in projecting the future liabilities of this Pension Fund, correct?

Page 1158

Egan - Recross
A. No.
Q. And why is that?
A. Because we assume that everyone earns one pension credit into the future. That's one of our assumptions.
Q. So that's because you essentially created a mechanic, an assumption that avoids the need to get shift information in projecting future liabilities, correct?
A. Yes.
Q. But I asked you a different question. The question I asked you was putting aside the mechanic that Segal employed in connection with this NMDU Fund, as a general matter, given how pension accruals are earned, it would be helpful in projecting future liabilities to obtain shift information?
A. Helpful to me or to someone else?
Q. Helpful to the actuary in projecting future liabilities.
A. I did not need shift information to project future liabilities.
Q. And that's because you couldn't

Page 1159

Egan - Recross
get shift information, correct?
A. No, because we assumed everyone earned one pension credit into the future. So we never asked for it to do liabilities.
Q. If somebody worked -- let's assume that you needed a hundred shifts to get a year of pension service, okay?
A. Okay.
Q. And if an employee worked 90 shifts, that employee would not get a year of pension credit, correct?
A. Under that scenario, yes.
Q. Right. And under the mechanic that you employed, your mechanic did not distinguish between employees who did not earn sufficient shifts to obtain a year of pension accrual, correct?
A. Repeat the question.
(The pending question was read.)
THE WITNESS: It's very confusing, what you're asking, because I'm not sure what you're asking.
MR. RICHMAN: Let's rephrase the question then.

Page 1160

Egan - Recross
THE WITNESS: When I calculate a liability, I ask the Fund for information to calculate liability. Shift is not information I need. I ask them for the pension credits that a participant has. I don't need to use shifts because they give me the pension credits that a participant has. I don't need to calculate that the person had 900 shifts so they didn't earn the pension credit. They give me the pension credit. I don't need the shift information. They're doing that calculation.
Q. But on occasion you project future liabilities and future accruals, correct?
A. Yes.
Q. And in connection with the projection of future accruals, you don't rely on past accruals, do you?
A. We assume that each participant earns a full pension credit each year into the future. That is one of the assumptions. So there is no need for us to

Page 1161

Egan - Recross

get that information --

Q. Okay. Now let's go back to my question.

A. -- in calculating liabilities for the Pension Fund.

Q. Now let's go back to my question. You assume each participant will earn a year of pension service in the future, correct?

A. Yes.

Q. You make that assumption notwithstanding whether that participant will earn sufficient shifts in a year in the future to actually get that pension service credit, correct? Yes or no.

A. Whether they do or not, it comes out in the next year's calculation. You have a gain or a loss. I'm not sure where there's a question. Maybe I'm not --

Q. Let me try it one more time and then I'll give up.

You make a projection about the number of participants that will earn service credits each year into the future,

Page 1162

Egan - Redirect

correct?

A. I assume that each participant will earn a pension credit. I don't say that now three of the four that are there are going to not get the pension credit. I say they all are getting a pension credit.

Q. Correct. And you make the assumption that they will all get the pension credit because you don't make an assumption about the number of shifts they will have in the future, right?

A. Yes, I guess. I'm not sure.

Q. Yes?

A. We don't make an assumption about the number of shifts into the future.

MR. MILLER: I have no further questions.

REDIRECT EXAMINATION BY MR. RICHMAN:

Q. This will be quick, I promise.

So Mr. Miller showed you Exhibits 134, 144 and 150, and he showed you that you weren't in those exhibits asking for information about shifts, and he asked you why not and you said you realized you did

Page 1163

Egan - Redirect

not need that information. Why?

A. Because the way we project contributions is not the way contributions are made. It is not taking by the number of people times the percentage times the wage rate times the shifts. It is just taking last year's contribution dollars and projecting those dollar amounts into the future by either increasing or decreasing them because of events that are expected to happen in the future. For instance if you expect the number of people to go down 10 percent, we take last year's contribution dollars and reduce it by the 10 percent going into the future. We expect if the trustees expect wage increases of two percent a year, we increase the contribution dollars by two percent a year. So there is no need to get wage rate information or shift rate information or contribution rate information to project contributions. We just need to know what changes are happening to those dollar contributions to do these projections.

Page 1164

Egan - Redirect

MR. RICHMAN: That's all I have.

MR. MILLER: That's all I have.

THE ARBITRATOR: Thank you very much, all.

(Proceedings adjourned: 5:08 p.m.)

C E R T I F I C A T E

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

I, DAVID HENRY, a Certified Court Reporter and Notary Public within and for the State of New York, do hereby certify:

That the foregoing is a true and accurate transcript of the proceedings herein.

I further certify that I am not related to any of the parties to this action by blood or marriage; and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 29th day of September, 2015.

DAVID HENRY

I N D E X

AMERICAN ARBITRATION ASSOCIATION

---------------------------------------X

THE NEW YORK TIMES COMPANY,

A Petitioner,

v.

NEWSPAPER and MAIL DELIVERERS'-PUBLISHERS' PENSION FUND,

Claimant.

---------------------------------------X

DAY 6 - VOLUME VI

ARBITRATION

New York, New York

Wednesday, October 7, 2015

REPORTED BY: BARBARA R. ZELTMAN

Professional Stenographic Reporter

Job Number: 97106

October 7, 2015
9:35 a.m.

Arbitration proceedings held at American Arbitration Association, 120 Broadway, New York, New York, before BARBARA R. ZELTMAN, a Professional Stenographic Reporter and Notary Public within and for the State of New York.

A P P E A R A N C E S:

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BY: RONALD RICHMAN, ESQ.,
MAX GARFIELD, ESQ., and
ADAM GARTNER, ESQ.

ALSO PRESENT: Jeffrey Zomper
Thomas Bentvena

ARBITRATION - VOLUME VI

(Whereupon, the following proceedings were had:)
MR. RICHMAN: Are you ready?
NEAL SCHELBERG,
having been first duly sworn by Arbitrator Irving, Notary Public, was examined and testified as follows:
DIRECT EXAMINATION BY MR. RICHMAN:
Q You're a partner at Proskauer Rose, correct?
A Yes.
Q How long have you been a partner there?
A I've been a partner --
MR. RICHMAN: I'll leave out through the preliminaries.
MR. MILLER: I will object when I need to.
MR. RICHMAN: Okay.
A I've been a partner for 28 years.
Q 28 years. Okay.
And what's your field of practice?
A Employees benefits.

ARBITRATION - VOLUME VI
Q And your specialization within that field?
A I represent Taft-Hartley funds.
Q And one of the funds is the NMDU Pension Fund?
A Correct.
Q How long have you been counsel to the NMDU Pension Fund?
A Since 1991.
Q Do you have a designation in terms as fund counsel, employer counsel, union counsel with respect to the fund?
A I've been designated employer trustee counsel.
Q Okay. And what does that mean as employer trustee counsel?
A Well, I'm co-counsel to the trust fund, but I was designated by the publishers, who were the employers who contribute to the funds.
Q But you are actually counsel to the Fund itself?
A Correct, I'm co-counsel for the Fund.

ARBITRATION - VOLUME VI

Q And I'm sorry, how long have you been counsel to the NMDU Pension Fund?
A Since, I believe, 1991.
Q And was someone at Proskauer counsel before that?
A No, no. They were a new client in 1991 and maybe 1990, 1991, 1992, some time around then, after the Newspaper and Mail Deliverers' Union and Maxwell Newspapers who purchased the Daily News, after that sale, I became counsel to the Funds.
Q Now, Proskauer is also counsel for The New York Times, correct?
A Correct.
Q Okay.
What services does Proskauer provide to The New York Times?
A I think we provide a range of services, including providing labor employment advice.
Q Does Proskauer Rose provide employer benefit proxies to its clients?
A I think we do on occasion.
Q And would you characterize The New York Times as an important client of Proskauer Rose's?

ARBITRATION - VOLUME VI

MR. MILLER: Objection.
Mr. Arbitrator, as you know, Mr. Schelberg is here today to testify on a very narrow issue. And that issue relates to Mr. Hayes' attendance at an October 11, 2011 trustee meeting.
The line of questioning that Mr. Richman is now engaging in is not foundational as it relates to the issue upon which Mr. Schelberg is here to testify. It is unrelated and, therefore, I object to this line of questioning.
ARBITRATOR IRVINGS: What's the relevance?
MR. RICHMAN: The relevance is -- arose yesterday and it's going to go to the sanctions motion that we are going to file.
As you know, there will be sanctions motions filed in every direction with respect to The New York Times having conversations with

ARBITRATION - VOLUME VI

Mr. Schelberg.
There was, in the flurry of e-mail yesterday, the defense raised by Evan with respect to the ability of The New York Times to speak with Mr. Schelberg about fund business. And as I said in a conversation that we had subsequent to that e-mail that we disagreed with that view, but you made clear on the telephone call that you weren't interested in hearing it at that point in time.
But it is something that the parties, I believe, are going to address in all the various sanctions motions that go back and forth.
MR. MILLER: But first, Mr. Richman should not be allowed to use this witness as a means of building an evidentiary case. I think, as a matter of law, he doesn't have one.
But he should not use this proceeding and this witness' testimony on that extrinsic issue to the merits of

ARBITRATION - VOLUME VI

this case.
Mr. Richman propounded and proffered an affidavit from Mr. Schelberg and that affidavit related exclusively to the issue that he's here to testify about today.
There was no indication in that affidavit and there was no indication in any of the communications that I had with Mr. Richman and in the conference call we had with you yesterday afternoon that this witness testimony today was going to be about building a case for sanctions against Mr. Schelberg or his law firm or me.
Let me strongly suggest -- I need to speak for Mr. Schelberg. If the Proskauer Rose law firm knew or thought that Mr. Schelberg was going to be testifying today as it related to a sanctions motion, rest assured that Mr. Schelberg would not be here and certainly would not be here without counsel.

ARBITRATION - VOLUME VI

MR. RICHMAN: Let me eliminate so we can avoid this issue.

MR. MILLER: But this goes way beyond the scope of the testimony that Mr. Schelberg indicated he would be focusing on and I believe you understood was the purpose of the testimony today.

MR. RICHMAN: Let me just respond to that because with a parade of horrors that is coming down the track is not really the case.

We are not filing a motion against Neal Schelberg or the Proskauer Rose firm. We have absolutely zero intention to do that. Zero intention to do that.

Our beef is with The New York Times.

And the fact of the matter is at the last hearing, there was some of the discovery taken very specifically that was permitted to be taken with respect to a sanctions motion that The New York Times claims it's going to file against

ARBITRATION - VOLUME VI

the Fund with respect to discovery.

This is the same issue. It doesn't involve the Proskauer firm, it doesn't involve Mr. Schelberg. And, quite frankly, I'm not asking -- we won't even be asking that Mr. Miller be sanctioned individually.

But we have a situation where there is a -- obviously, been some very difficult issues that have come up in the course of discovery and this is one of them.

We wouldn't be here today had -- we just permitted Mr. Schelberg's affidavit to come in.

ARBITRATOR IRVINGS: Let me cut this short. I understand that there's going to be potentially you raised an issue of sanctions regarding documents with Mr. Hayes. That's within the context of this case --

MR. RICHMAN: Right.

ARBITRATOR IRVINGS: -- and

ARBITRATION - VOLUME VI

evidence in this case. And you can make your arguments at the appropriate time.

The allegation that there was no violation of rules of ethics, quite frankly, if you want to raise that, take it to the board of Bar overseers. But that's not whether they should or shouldn't have spoken to them yesterday. Let's focus on why he was here, why he was called and get to that.

You are free to raise the other discovery sanctions in your closing brief, but the Rule 4.2 issues, that's a matter for the Bar overseers.

MR. RICHMAN: But here's the difference here, it relates very specifically in attempt to change the testimony with respect to Mr. Schelberg and it relates very specifically to discovery and the conduct of this case.

And I respectfully disagree that it doesn't.

ARBITRATION - VOLUME VI

It should not be addressed in this case.

ARBITRATOR IRVINGS: You are free to ask about communication, but I'm not going to go into a broad-ranging detour.

MR. RICHMAN: Okay. I'll make it very short.

ARBITRATOR IRVINGS: Okay.

BY MR. RICHMAN:

Q So yesterday, Mr. Schelberg, you had some conversations with the Jones Day firm?

MR. MILLER: Objection.

Mr. Arbitrator, even as a relates to conversations that I may have had with Mr. Schelberg yesterday, I would submit that that's not the purpose for which he's testifying about today.

What Mr. Richman should ask him about is facts that relate to the October 11, 2011 trustee meeting and Mr. Hayes. That's what his affidavit was all about. The affidavit that the Fund

ARBITRATION - VOLUME VI

indicated if it went into evidence, Mr. Schelberg wouldn't even be here.

So that's the issue that needs to be -- for which live testimony needs to be taken and that issue only.

ARBITRATOR IRVINGS: To the extent that reflecting on our discussions yesterday there are questions about when that testimony changed from the affidavit, this is a fair grounds for inquiry.

Go ahead.

BY MR. RICHMAN:

Q Mr. Schelberg, so you had discussions with Jones Day yesterday?
A Yes.
Q With whom did you have discussions?
A With Evan.
Q And how long were those discussions?
A Brief.
Q And what was the nature of those discussions?
A We talked about today's hearing.

ARBITRATION - VOLUME VI

Really, it was about logistics, what time I should be here. Those kinds of things.
Q Did you have any discussion with Mr. Miller or anyone else from Jones Day with respect to what you might provide in an affidavit in connection with this hearing?
A A proposed affidavit was sent to me.
Q By Mr. Miller?
A Correct.
Q And what was the nature of the proposed affidavit?
A I didn't really go through it because I knew my testimony would be here. I scanned it, but I didn't get to it in detail.

Relate my quick -- my quick review of it related to the trustee's meeting that is apparently in question, the October 11th meeting, and how that meeting was conducted, you know, kind of just confined to that.

But again, I must tell you I looked at it very quickly because I knew I had to

ARBITRATION - VOLUME VI

be here, so I wasn't really focused on the affidavit.
Q Okay.

But before Mr. Miller sent you the affidavit, you had a discussion with him about the contents of what was going to be in the affidavit, correct?
A We talked about issues relating to the way the meeting was conducted, you know, whether those discussions led to the affidavit and whether all the material terms of that discussion were in the affidavit, that, I can't tell you about.

But yes, we did have a general discussion about how meetings were conducted on the Drivers' funds.

MR. RICHMAN: I'm going to move on from here. I think I have enough.

ARBITRATOR IRVINGS: Okay.

BY MR. RICHMAN:

Q So let's focus on the October 11th meeting.

Now, we do have -- I'm sorry, before we actually focus on the meeting, I

ARBITRATION - VOLUME VI

just want to talk about how minutes were taken, the process that went through to go from the board meeting to final approval minutes.

So you attended board meetings?
A Yes, I did.
Q And when you attended board meetings, what was the purpose for you being there?
A I was serving as counsel to the trust, so I was there to serve in that capacity, give advice on issues that arose during the course of the meeting.
Q Okay.

And was there somebody who attended the meetings -- and I'm focused on the Pension Fund meetings -- was there someone who attended the meetings who took notes to prepare the minutes?
A Well, we had someone who prepared the minutes.
Q Who was that?
A John Urbank, U-R-B-A-N-K, at the Segal Company.

ARBITRATION - VOLUME VI

Q And so did Mr. Urbank take notes at the meeting?

A Correct.

Q Okay.

And what was your involvement in the process of creating minutes from the meeting?

A The process that we followed was that John Urbank would actually prepare a draft set of minutes.

The minutes would be sent to myself and to the then director of the Fund, Murray Schwartz.

Murray and I would then schedule a time after he and I individually reviewed the proposed draft and we would go through the minutes.

Q So when you say "schedule a time," was that actually a meeting or a telephone conference?

A No. Murray and I would pick some, you know, evening, always happened around 6:00, I always wanted to get home and Murray would keep me on the phone for a long time,

ARBITRATION - VOLUME VI

but that's okay.

And we would spend an hour or so going through the minutes, Murray had his comments, I had my commends. I would incorporate our comments and send that draft to my co-counsel for their review.

Co-counsel would then review the minutes. They might have some changes, they might accept it as is and we would work towards finalizing the minutes, send it back to John. John would then present it at the next meeting that followed.

Q Okay.

Let me see if we can expedite this.

MR. RICHMAN: Could you show him the October 11th. It's in the yellow book.

BY MR. RICHMAN:

Q Got it?

A Yes.

Q Okay.

So am I correct that you stated that you would spend an hour or two with Murray on the phone to discuss the minutes?

ARBITRATION - VOLUME VI

A Yeah, depending upon the length of the minutes, the details that we needed to go through, some issues more complicated, maybe they weren't stated properly. That kind of thing. So there was no hard and fast rule, but with Murray, they were always long conversations.

Q Okay. All right.

And I'm sorry, you said that you sent it to co-counsel?

A Correct.

Q Who was the co-counsel at the time of the October 11, 2011 meeting?

A It's indicated in the minutes under Present.

It was Warren Mangan, as well as Elizabeth O'Leary.

Q Okay. And what was Mr. Mangan's role?

A I often ask myself that question, but he was designated as the Union trustee co-counsel. And Elizabeth functioned, I suppose, as Plan counsel.

Q Okay.

ARBITRATION - VOLUME VI

So at this time with respect to this meeting, would you have gone through the process that you described?

A I would think so, yes.

Q Do you have any reason to believe that you wouldn't have gone through that process?

A I mean, that was the typical process that we followed. And I would have no reason to believe that we didn't follow it. I couldn't tell you for a fact we did, but I would think we would follow that process.

Q And would you receive comments from co-counsel on a regular basis?

A Yeah, yeah.

Q And so who incorporated those comments?

A Typically, it would be me because, you know, I was the one who had the conversation with the director and Murray was very meticulous about minutes and always had lots of comments, so I kind of had the master draft.

But, you know, it would depend, depend upon the nature of the issues. Maybe Elizabeth was more hands-on in a particular issues so maybe she would have done it.

But they followed my lead, for the most part.

Q Okay.

So if you incorporated the comments, what would you then do?

(Mr. Zomper enters the room.)

A I would incorporate the comments from co-counsel, produce a final draft, give everyone the opportunity to have one final review of it.

If I received no further comments, I would then send them to John Urbank, who would actually present it at the next meeting as the minutes of the preceding meeting.

Q And when you say "present it to everyone," who is included in the "everyone"?

A "Everyone" would have been all of the trustees and to the director, Murray.

Q And did you also send it to co-counsel?

A Yeah, it would have been sent to all co-counsel and to the trustees and to the director.

Q And did you generally receive comments back from the trustees with respect to the minutes?

A If we did, it was at the meeting itself, so we typically did not get comments before the meeting. It could happen.

More often than not, the trustees, you know, spent a fair amount of time going through the minutes before the meeting and they came to the meeting and they could raise issues at the meeting.

Q If there were an issue raised at the meeting, the next meeting about the preceding meeting's minutes, would that be reflected in the minutes of the next meeting?

A We could do it either one of two ways and it depended upon the nature of the comment. If there was a typo or something

like that, we would just correct it and then republish the minutes of the preceding meeting.

Q Right.

A If it was a comment that was more substantive in nature, what we would do is we would -- in the minutes of the meeting that we were at, we would reflect that the minutes of the preceding meeting, there was further discussion and either it was not stated properly or there was some other iteration or some other comment, so it would be reflected in the next meeting.

Q Do you recall any conversations with respect to this October 11, 2011 minutes during the minute creation process?

A I would say this to you.

Since October 11, 2011, I probably have attended 500 meetings.

Q So you don't remember this one?

A This doesn't jump off page.

Q Okay.

A So, you know, we typically got comments because, again, that was Murray.

And it could be as simple as we started -- I see the meeting was called at 10:30, maybe Murray would call me and say, no, the meeting started at 10:27, so we would change it, pretty meticulous, but I have no recollection.

Q Okay.

Are you familiar with the voting requirements of the Trust Agreement of this Pension Fund?

A I represent a lot of funds. I can't tell you that I have it memorized, but I have a general sense of it.

Q And do you know whether there is a quorum requirement?

A I believe there is.

Q Do you know what it is?

A Off the top of my head, I can't tell you, it would either have been one and one or two and two.

One employer trustee/one Union trustee, or two employer trustees and two Union trustees.

Q In terms of when you attended,

ARBITRATION - VOLUME VI

let's say, the Pension Fund meetings, whatever issues that arose with respect to the quorum requirement?

A Could you restate? You are asking whether there were --

Q Issues that arose with respect to the quorum requirement?

A An issue would only arise if there was some question whether there was a quorum or not. And I can't tell you. I'm not following. Are you asking specifically at this meeting?

Q No, no. Just generally.

A You know, I'd go around the room before the meeting starts and I kind of make a mental check to make sure we have enough trustees to convene a meeting.

If we don't, we will state it because then the actions we take at that meeting, since the meeting was not duly constituted, raises some questions as to whether we've convened a meeting.

So I kind of have a mental check when I go around to see who is in the room.

ARBITRATION - VOLUME VI

Q Okay.

Do you know whether you did it for this meeting?

A I think it -- I'm not sure --

Q Do you want to take a minute and look at the minutes?

A I'm just not remembering whether we noted that there was a quorum or I can just see by the people who were here, this constituted -- the four individuals here constituted the full board of trustees, so I'm going to assume we had a quorum based upon just --

MR. MILLER: Mr. Arbitrator, objection. He's just speculating at this point. He has no recollection.

ARBITRATOR IRVINGS: Okay. What's the question, please, exactly?

MR. RICHMAN: I asked if he had any recollection of any quorum issue arising out of this meeting.

MR. MILLER: Yes or no?

MR. RICHMAN: He can't say yes or no.

ARBITRATION - VOLUME VI

A Again, you are asking me to go back to a particular meeting that I attended almost exactly four years ago. And asked me whether there was a quorum at this meeting, whether there was any discussion whether there was a quorum. I have no recollection whether that is so or not.

Q Okay.

Do you know whether, under the Trust Agreement, a trustee can give his proxy --

A I believe there is a proxy.

Q Sorry, you have to let me finish.

A I'm sorry.

Q -- his proxy to another trustee to vote?

A I believe there's a proxy provision and I believe it allows proxies to be given to another trustee.

Q Okay.

Do you know whether in this October 11, 2011 meeting any of the trustees gave a proxy to any of the other trustees?

A I have no recollection.

ARBITRATION - VOLUME VI

Q And if that did occur, would that be in the minutes?

A I would hope it would be in the minutes.

Q And just incidentally, I said proxy to any of the other trustees.

Is there a mechanism for a trustee to give a proxy to somebody who is not a trustee?

A I don't have the Trust memorized.

If you want to give me a copy of the Trust, I might be able to answer your questions.

MR. MILLER: The Trust speaks for itself. Either allow it or not. We're all lawyers, we can interpret the Trust.

ARBITRATOR IRVINGS: Thank you.

What's your response?

MR. RICHMAN: The response is we are all lawyers, we can read the Trust and -- but if it will refresh the witness' recollection, I think he should look at it.

ARBITRATION - VOLUME VI
ARBITRATOR IRVINGS: And you are saying it would refresh his recollection as to whether there was a proxy given or you can --
MR. RICHMAN: Well, I wanted to -- look, yes, we're all lawyers and we can argue what the Trust means. But we have with us Fund counsel, or one of the Fund counsel.
ARBITRATOR IRVINGS: Show him if his refreshes his recollection.
MR. RICHMAN: It's going to take two seconds, shorter than this discussion.
BY MR. RICHMAN:
Q Forty-seven in the red book.
Yeah, take a look at Voter Trustee 6.4, on Page 28, which is FUND-2304.
A If I may, may I just read it?
ARBITRATOR IRVINGS: Yes.
Q Yeah, read it. You don't have to read it out loud.
MR. MILLER: Read to yourself.
A Okay.

ARBITRATION - VOLUME VI
Q Okay.
So is it correct to say that the proxy can only be given by a trustee to another trustee?
A I'm looking --
Q Look at C.
A Okay.
MR. MILLER: It says what it says.
But I think the question here was Mr. Schelberg was going to look at the document and see if it refreshed his recollection, so let's ask that.
A Okay. I can answer the question, if you want.
Q Please.
A The Trust Agreement provides that a proxy can be issued to -- if it's an employer trustee, to another employer trustee; if it's a Union trustee, to another Union trustee, as the case may be.
Q And it needs to be in writing, correct?
A It needs to be in writing.

ARBITRATION - VOLUME VI
Q Let me show you this affidavit.
MR. MILLER: Objection.
The whole reason that Mr. Schelberg is here today is to obviate the discussion of and submission into evidence of this affidavit.
If he wants to ask him questions, let him ask questions.
MR. RICHMAN: I'll ask him questions.
BY MR. RICHMAN:
Q So, Mr. Schelberg, the October 11, 2011 final minutes incorporated your comments, correct?
A I believe so, yes.
Q Okay.
Do you have any recollection of Mr. Hayes -- and you know who Mr. Hayes is?
A Yes.
Q -- giving his vote of proxy to another trustee in connection with the October 11, 2011 meeting?
A I have no recollection.
Q Sorry. Just bear with me one

ARBITRATION - VOLUME VI
second.
So why don't we take a look at the October 11th minutes. And there are several places in the minutes. The first place, I think, if you take a look at the third page of the minutes. That's the one on the top that says "Page 3" and starts with an "H."
And you see a motion made with respect to Quan-Vest?
A Correct.
Q Second, they unanimously adopted.
And then there's a second motion with respect to Quan-Vest, right?
A Right.
Q And in order for those motions to be seconded and unanimously adopted, there would need to be a quorum; is that correct?
A Under the terms of the Trust, yes.
Q Now, let's go to Page 5 of the minutes, please.
And looking at -- if you look in Roman Numeral IX C in the middle of the page.

ARBITRATION - VOLUME VI

Do you see that?

MR. MILLER: We have a redacted version. And you've asked him about a portion of the minutes that have been redacted in connection with this case.

MR. RICHMAN: Well, I would like to show the witness an unredacted version.

ARBITRATOR IRVINGS: No.

MR. MILLER: No.

BY MR. RICHMAN:

Q If there were motions made during this meeting that indicate that they were seconded and unanimously adopted, those motions would be to meet the quorum requirement, correct?

A Yes.

Q Okay. Let's skip the redaction.

MR. RICHMAN: I think I just need to take a minute or two.

ARBITRATOR IRVINGS: Okay. Great.

(A brief recess was

ARBITRATION - VOLUME VI

taken.)

BY MR. RICHMAN:

Q In connection with the October 11, 2011 Pension Fund meeting, do you have or did you ever see a written proxy from any of the trustees giving their vote to another trustee?

A No, I did not.

Q Is that something you would have seen?

A I would think that if there was a proxy, I would have seen it, yes.

Q With respect to -- turn to Page 4 of the minutes, please.

And you see Roman Numeral VIII is the Segal report.

Do you see that?

A Yes.

Q And in A, there is a reference to withdrawal liability determination for El Diario.

Do you see that?

A Yes, I see that.

Q Do you recall any of that

ARBITRATION - VOLUME VI

discussion?

A Not specifically.

I knew El Diario was a contributing employer, but I don't have any specific recollection of this.

Q Okay.

Did you provide any input into the discussion with respect to what a partial withdrawal was?

MR. MILLER: Objection.

He just testified he doesn't remember any.

MR. RICHMAN: I'm working on his memory here.

MR. MILLER: Go ahead.

A You know, if there was a discussion at the meeting, I probably participated in that discussion.

Q Well, is there any doubt that there was a discussion at the meeting?

A No, no, it says there was.

MR. RICHMAN: I have no further questions.

MR. MILLER: Give us a couple

ARBITRATION - VOLUME VI

of minutes.

ARBITRATOR IRVINGS: Certainly.

(A brief recess was taken.)

CROSS EXAMINATION BY MR. MILLER:

Q Mr. Schelberg, I think in connection with your direct testimony, you testified that you had no recollection of Terry Hayes giving his vote to another trustee by proxy during the October 11th meeting.

Do you remember that testimony?

A Yes.

Q But am I correct that you have no recollection, one way or the other, as to whether Mr. Hayes gave a proxy?

A Correct.

Q Can you recall any occasion in which a trustee gave his proxy to another trustee in connection with a trustee vote on an agenda item?

A May I ask a question?

Do you mean with respect to the driver's fund or just generally or --

Q My question related to the NMDU Fund.
A Okay.
I honestly cannot recall a time where there was a proxy given. I just don't remember it. It doesn't happen that often and I just don't remember whether it ever happened on the Fund. I just don't recall.
Q Do you recall whether there have been occasions in which trustees of the NMDU Fund arrive to meetings late or leave meetings early?
A Yes, they do.
Q In a circumstance in which a trustee needs to leave a meeting early, have there been occasions in which the trustee advises the Fund director of that fact, and as a consequence, the sequence of consideration of agenda items is changed in order to ensure that they vote on an item occurs while a quorum of trustees remain?
A Yes.
Q Let me draw your attention back to Exhibit 140.

A Yes.
Q Those are the minutes of the October 11th.
A Okay.
Q And why don't you turn your attention to Page 5.
A Okay.
Q And Item Roman X, which is entitled Fund Office.
And you'll see under Item X, it indicates that, "A motion was made and unanimously approved at this October 11th meeting to approve a 3 percent wage increase to Fund office personnel."
Do you see that?
A Yes, I do.
Q Is this an example of the kind of agenda item that would be of sufficient importance to the Fund director so that if a trustee needed to leave a meeting early, the Fund director would change the order of the agenda items to ensure that this issue was taken up before the trustee had to leave?
MR. RICHMAN: Objection.

ARBITRATOR IRVINGS: You're asking him to speculate on what was in Mr. Schwartz's mind?
MR. MILLER: I'll withdraw the question.
ARBITRATOR IRVINGS: Thank you.
BY MR. MILLER:
Q In instances in which trustees left early, and as a consequence, the agenda items had their sequence changed in order to cast a vote while a quorum of trustees remained present, would the minutes necessarily have reflected that change in the sequence of agenda items?
A Probably not.
Q I think you were asked a couple of questions on direct about trustee review of minutes of meetings.
You don't know whether in the extent particular trustees actually reviewed any particular set of minutes, do you?
A No.
Q There were several questions that Mr. Richman asked you about the quorum rules

for the NMDU Fund.
Can you say for certain that in connection with all votes at all trustee meetings of the NMDU funds, the quorum rules were satisfied?
A I can't say that with certainty. I would hope they were, but I can't say that for certainty.
Q Okay.
MR. MILLER: Give us a couple of minutes. It really will be just a couple of minutes to see if I have any further questions.
MR. RICHMAN: All right.
MR. MILLER: I have no additional questions.
MR. RICHMAN: I do. Just a couple of questions.
REDIRECT EXAMINATION BY MR. RICHMAN:
Q So, Mr. Schelberg, when you get the minutes from Mr. Urbank, right, do they go in the order of the agenda or do they go in the order of the meeting?
A Murray was very meticulous and he

ARBITRATION - VOLUME VI

would match up the minutes with the agenda. So, you know, Item Number 1 on the agenda would be Item Number 1. Item Number 2 would be Number 2 and we followed all the way through.

Q When you do -- if you look at X, where it says, "Poll vote, 3177," number on the bottom.

What's a "poll vote"?

A What would happen is between regularly-scheduled meetings, if there was some item that needed to be considered by the board, what Murray would do is, he would call the trustees and poll them, speak to them and orally get their vote.

And then at the next regularly-scheduled trustees' meeting, he would state it as another agenda item and note that the poll vote that occurred between the regularly-scheduled meetings would then be presented and it would then be ratified by the trustees at that meeting.

Q And that's to make sure the Trust Agreement procedures were followed?

ARBITRATION - VOLUME VI

A Well, two things: Number 1, yes.

And then Number 2, to ensure that it's then recorded in the minutes, otherwise, it would not have gotten into the minutes.

MR. RICHMAN: I have no further questions.

MR. MILLER: No further questions.

MR. RICHMAN: All right. You are free to go.

MR. MILLER: Thank you.

(A brief recess was taken.)

FURTHER CROSS EXAMINATION:

Q Good morning, Mr. Urbank.

A Good morning.

Q So I'm going to divide the questioning this morning into two parts.

The first, we'll just, essentially, take up where we left off in the prior cross-examination and we'll be focusing on documents primarily, not exclusively, in this white binder.

ARBITRATION - VOLUME VI

And then for the second part, I'll be discussing with you various documents in the yellow binder and, more particularly, minutes of trustee meetings and exhibits thereto.

So with that as a background, let's dive in and let's begin by reviewing your prior direct testimony.

And I believe that you have a transcript of your prior direct testimony in front of you.

MR. RICHMAN: Why are we doing this?

MR. MILLER: It's cross-examination.

ARBITRATOR IRVINGS: Go ahead.

BY MR. MILLER:

Q So I would like to draw your attention to Page 451 of the transcript.

Are you there?

A Yes.

Q Good.

And what I would like you to do is to read the questions and answers that you

ARBITRATION - VOLUME VI

gave in connection with your direct testimony that begin on Page 451 at Line 17 and go down to Page 452 at Line 11.

Okay. So why don't you do that.

A Out loud?

Q Please.

ARBITRATOR IRVINGS: Why are we doing that?

MR. MILLER: It's foundational. I'm then going to ask him about that testimony. It's cross-examination.

ARBITRATOR IRVINGS: Well, I don't mind you asking him about his testimony. I have a philosophical issue about people reading aloud.

MR. MILLER: Okay. That's, essentially, for your convenience because you don't have the document.

I'll give it to you.

Q Okay. Go ahead, why don't you just read it.

A From 17 to where?

Q From 17 to Line 11 on 452.

A Okay.

Q Okay.
So is it still your testimony that the basis for your view that CBU's shifts is that you were advised by the Fund office that that's how the Fund was receiving its contributions from contributing employers?
A Yes.
Q So just to clarify, the basis for your view that CBU's shifts is that the Fund received its contributions from the employers on the basis of shifts, correct?
A Yes.
Q What if a contributor to the Fund compensates its employees based not on shifts, but on a different method?
For example, what if an employer that contributes to the Fund compensates its employees based on salary? In such a case, how would you compute whether that contributor has 70 percent decline for partial withdrawal purposes?
MR. RICHMAN: Objection.
He's a fact witness. He's not providing opinion about how to do

something.
I don't understand the hypothetical. Why he's being asked hypothetical questions.
MR. MILLER: Well, first, there's been testimony in the record that some of or at least one of the contributing employers here, in fact, compensates its employees not based on shifts, but based on salary.
And so relying upon that, I want to ask questions that go to the reasonableness and the legitimacy of the position that shifts are CBUs, which is at the heart of the matter here.
MR. RICHMAN: And we're also missing a foundation question about whether he does this.
MR. MILLER: I'm sorry, I used the wrong verb.
As you know, there's been some testimony that employers compensate their employees based on salary. They receive a salary. And that they then contribute

to the Fund based on salary.
ARBITRATOR IRVINGS: Okay.
But there was a foundation objection raised, which is legitimate.
So do you want to deal with the foundation as to whether he does the calculations?
MR. MILLER: Okay.
BY MR. MILLER:
Q Do you perform withdrawal liability calculations in connection with your work or did you perform withdrawal liability calculations in connection with your work for the Pension Fund?
A No.
Q Those calculations were performed by your colleague, Ms. Egan, correct?
A If requested.
Q If requested.
And -- but it was your pattern and practice to review those calculations and present those calculations to the client, the Fund, correct?
A I reviewed the correspondence, too.

I didn't review the actual calculation, the mathematical determinations.
Q Would you present the calculation findings to the Fund?
A Yes.
Q So, therefore, you have familiarity with the general rules in which withdrawal liability calculations are made, correct?
MR. RICHMAN: Objection.
And the issue of "you present."
MR. MILLER: Well, he answered the question.
MR. RICHMAN: Well, the problem is the "you."
Who is the "you" in this?
And he also didn't testify with regard -- to make the jump of the familiarity.
If you want to ask him base questions about how familiar he is with, you can ask that, although I'm going to object on the ground that if he didn't perform the calculations, why are we asking with respect to this fund, he

ARBITRATION - VOLUME VI
shouldn't be asked questions about.
ARBITRATOR IRVINGS: Taking it one at a time.
I interpreted "you" as him personally, not the royal "you."
MR. MILLER: And that's the intent of the question.
ARBITRATOR IRVINGS: Okay. So let's start with that.
Just to clarify, did you personally present calculations to the Fund to the trustees?
THE WITNESS: No.
ARBITRATOR IRVINGS: You did not?
THE WITNESS: Presented the correspondence to them. I don't recall actually presenting a partial withdrawal liability calculation to the trustees personally.
BY MR. MILLER:
Q Nonetheless, are you generally familiar with the rules that govern calculation of complete withdrawal and

ARBITRATION - VOLUME VI
partial withdrawal?
A I understand, yes.
Q And you have been present at NMDU Fund meetings in which your colleagues discussed withdrawal liability calculations that they made at the request of the Fund, correct?
A Yes.
MR. MILLER: So, Mr. Arbitrator, I think that he has a sufficient background to be asked his view on how the fact that one of the employers both compensated and made contributions to the Fund based on salary comports with his position about what constitutes contribution base units.
MR. RICHMAN: Which employer are you speaking about?
MR. MILLER: The Union. There was testimony about that. Union employees.
MR. RICHMAN: Is the Union subject to the Collective Bargaining

ARBITRATION - VOLUME VI
Agreement?
MR. MILLER: The point is that there's been testimony that the Union compensates its own employees on a salaried basis and makes contributions on a salaried basis.
I would like to ask this witness how that fact squares with his assumption.
ARBITRATOR IRVINGS: You can ask him about factual questions. He's not here as an expert.
MR. MILLER: Okay.
BY MR. MILLER:
Q So it is the case that during the course of the engagement that Segal had with this fund, that Segal did calculate withdrawal liability both for withdrawing employers and in connection with requests for estimates, right?
A Yes.
Q And in connection with those efforts, you would routinely ask Mr. Schwartz and the Fund office for certain

ARBITRATION - VOLUME VI
data that allowed the Segal team to prepare the calculation, correct?
A Yes.
Q And typically, you would ask for that information in the form of a written letter, correct?
A Yes.
Q Draw your attention to the white book.
Why don't you take a look at Exhibit 15.
MR. RICHMAN: Exhibit?
MR. MILLER: 15.
BY MR. MILLER:
Q So you'll see that Exhibit 15 is a letter dated March 11, 2009 from you to Mr. Schwartz in connection with a request for a calculation of withdrawal liability.
Do you see that?
A Yes.
Q Did you write this letter?
A Yes.
Q And did you, in fact, request this data?

ARBITRATION - VOLUME VI

A Yes.

Q And you'll note in the second paragraph under 2, there's a reference to hours. It says, "Shifts/hours"?

A Uh-huh.

Q Was information about hours relevant to calculation of NMDU Fund withdrawal liability?

MR. RICHMAN: Mr. Arbitrator, I object to this line of questioning.

This is documents that not only did The New York Times have, but they all asked these questions before on cross-examination.

MR. MILLER: The prior cross-examination was aborted on finishing, as I indicated, right at the outset. I'm finishing that cross-examination and then I'm going to move on to the supplemental documents.

And, frankly, I don't have much more on cross.

ARBITRATOR IRVINGS: Go ahead.

ARBITRATION - VOLUME VI

MR. RICHMAN: Okay. I just want to note for the record that specific question was asked before.

ARBITRATOR IRVINGS: Do you want to reask it?

THE WITNESS: Thank you.

BY MR. MILLER:

Q Was information about hours relevant to calculation of NMDU Fund withdrawal liability?

A There is, in the Plan document, reference to hours for purposes of pension credit for non-work events, such as vacation.

So my belief is that the reason it's stated shifts and hours is because of that.

Q So in connection with this March 11, 2009 request for data from the Fund, did the Fund ever respond to you?

A I don't know a hundred percent certainty, but I would assume that they would have --

MR. RICHMAN: Objection.

ARBITRATION - VOLUME VI

You either know or you don't.

A I don't know for certain that they did.

Q Do you recall if Segal ever performed the withdrawal liability estimate calculation that's referred to in this letter?

A No.

Q No, you don't recall?

A I don't recall if we specifically did it for this request.

Q Okay.

If the calculation had, in fact, been prepared, would the calculation itself and the worksheets relating to that calculation be in Segal's files?

A Yes.

Q And you are aware that there was a request for documents made to Segal encompassing estimates prepared for The New York Times, correct?

A Yes.

Q And do you have any reason to believe that if the work had been performed

ARBITRATION - VOLUME VI

that's referred to in connection with this letter -- strike that. Let me ask it a better way.

Do you have any reason to believe that if the work relating to this letter were in Segal's files, it would not have been produced to The New York Times in this case?

A No.

Q Now I want to draw your attention to the yellow binder in Exhibit 135.

Exhibit 135 are minutes of a September 24, 2010 trustees meeting.

And if you draw your attention to, I think, it's Page 5 of the minutes, it's at FUND-03147. Roman numeral heading XI.

Do you see that there, New York Times?

A Yes.

Q And it makes reference to an Exhibit L, which is a Proskauer Rose letter regarding New York Times request for a withdrawal liability estimate.

Do you see that?

Page 1224

ARBITRATION - VOLUME VI
A Yes.
Q And why don't you turn a couple of pages thereafter to FUND-03363.
And you'll see that there is an August -- and that is an August 4, 2010 letter from Stephen Mogila of Proskauer Rose to Murray Schwartz.
Do you see that letter?
A Yes.
Q Why don't you take a moment to read the body of that letter to yourself.
A I've read it.
Q Okay.
So I take it that in connection with preparation of withdrawal liability estimates that Segal would make relating to this Pension Fund, Segal would charge for that service, correct?
A The Fund would.
Q Segal would charge the Fund?
A The Fund would charge.
Q The Fund would charge --
A Charge the employer for the calculation.

Page 1225

ARBITRATION - VOLUME VI
Q Okay.
So if an employer made a request for an estimate of withdrawal liability, the Fund would charge the employer for a cost relating to the preparation of such estimate, correct?
A Correct.
Q And as set forth in this letter in connection with a withdrawal liability estimate that The New York Times requested, the Fund, in turn, sought a $1,000 fee from The Times to cover its costs for preparing that estimate, correct?
MR. RICHMAN: Objection.
You gotta start with has he seen the letter before.
MR. MILLER: I was asking generally questions. If you would like --
MR. RICHMAN: No, no. You were referencing the letter.
If you are going to reference the letter and ask questions about the letter, you gotta ask if he's ever seen

Page 1226

ARBITRATION - VOLUME VI
the letter.
MR. MILLER: I have no problem with that.
Q Have you ever seen this letter before?
A It's part of the minutes. I would have saw it.
Q And you testified that you understood that the Fund did charge employers a fee when those employers requested a withdrawal liability calculation, correct?
A Yes.
Q And do you recall generally the fee amount that the Fund would request for performing and calculating the estimate?
A Thousand dollars.
Q Do you have any reason to believe that it was not a thousand dollars?
A No.
Q And this letter indicates and attaches, in fact, a check from The New York Times or from -- I'm sorry, it attaches a check from the Mercer company, and as

Page 1227

ARBITRATION - VOLUME VI
indicated on the letter, that check is being provided to the Fund on behalf of The Times.
Do you see that?
A Yes.
Q All right.
The letter goes on to say that Mr. Mogila had reached out to you, Mr. Urbank, and had instructed you to prepare a withdrawal liability estimate for The New York Times.
Do you see that sentence in the letter?
A Yes.
Q Do you recall a conversation with Mr. Mogila relating to a New York Times estimate for withdrawal liability?
A I don't.
Q You'll note that the date of this letter is August 4, 2010.
Do you recall whether Segal ever prepared a withdrawal liability estimate on behalf of The New York Times on or around August of 2010?
A I don't.

ARBITRATION - VOLUME VI

Q If Segal had prepared an estimate in 2010, would that be in Segal's files?
A Yes.
Q Do you have any reason to believe that if the work had been performed and was contained in Segal's files, it would not have been produced in The New York Times in this case?
A It would have been produced to the Fund.
Q Do you know if The New York Times ever received an estimate of withdrawal liability based on the request and payment that is referred to in this August 4, 2010 letter?
A No.
Q Now I need you to go back to the white book. And why don't you open up Exhibit 17.
And why don't you take a moment and familiarize yourself with this document.
Ready?
A Yes.
Q So this document is a memorandum

ARBITRATION - VOLUME VI

from you and your colleague, Ms. Egan, to Murray Schwartz and it provides Mr. Schwartz with a partial withdrawal liability calculation for The New York Times, correct?
A Yes.
Q Did you prepare this memo or have a hand in its preparation?
A I prepared it with Ms. Egan.
Q Did you discuss the withdrawal liability results that are contained on Page 2 of this memorandum with Mr. Schwartz?
A I don't recall.
Q And you'll note that on Page 2 of this memorandum, it provides a calculation both for a partial withdrawal and a complete withdrawal amount.
Do you see that in the second paragraph on Page 2?
A Yes.
Q And let me draw your attention back to the first paragraph of this memorandum.
And why don't you read the second sentence, the sentence that begins, "This partial withdrawal calculation reflects ..."

ARBITRATION - VOLUME VI

A "This partial withdrawal calculation reflects that there was a partial cessation of the employers' obligation to contribute to the plan as of January 2009 at City and Suburban."
MR. RICHMAN: You can always read to yourself.
MR. MILLER: You can.
THE WITNESS: I was doing it for the stenographer.
MR. RICHMAN: No, you don't have to.
Q The calculation that's contained -- or calculations that are contained in this memorandum, these calculations were not performed in response to a withdrawal liability estimate from The New York Times, correct?
A I don't recall.
Q So you don't know one way or the other whether the Fund directed you to make these calculations or they were in connection with a request from The New York Times?

ARBITRATION - VOLUME VI

A The Fund would have requested it.
Q But you don't know whether the Fund's request was as a consequence of a request by The New York Times for an estimate?
A No.
Q You don't know one way or the other?
A No.
Q And drawing attention, again, to the second sentence in the first paragraph which refers to City and Suburban.
Are you aware whether the partial withdrawal liability calculation that was requested by the Fund was in connection with a potential 70 percent partial withdrawal or another form of partial withdrawal?
A I don't recall.
Q All right. Let's move from that document to Exhibit 4 in the same binder.
And Exhibit 4 should be an August 15, 2011 letter from Mitch Hofing to Stephen Mogila.
I apologize, Mr. Urbank, before I

ARBITRATION - VOLUME VI

get into questions on Exhibit 4, which is an August 15, 2011 letter, I want to, again, point out to you the date of the letter that we just went over, the letter which is in Exhibit 17.

So take a look first at Exhibit 17 again and please make note of the date of that memo, July 19, 2011.

Do you see that?

A Yes.

Q Okay.

And now let's turn to Exhibit 4, which is, as you'll see, an August 15, 2011 letter.

So this letter in Exhibit 4 is dated less than 30 days after the Segal Company had provided its calculation of The New York Times partial and complete withdrawal liability, correct?

A Yes.

Q Why don't you take a moment to familiarize yourself with the letter.

So you'll note that in Paragraph 1 of this letter, it indicates that The New

ARBITRATION - VOLUME VI

York Times is requesting an estimate of withdrawal liability as if a complete withdrawal had occurred during the most recent Plan year.

And in Paragraph 2, it essentially asked for backup worksheets in connection with that complete withdrawal liability calculation request.

Do you see that?

A Yes.

Q Have you ever seen this letter before?

A I don't recall.

Q Did you ever receive a call from Fund counsel or anyone else from the Fund in the summer of 2011 about preparing a response to a request from The New York Times for withdrawal liability?

A I don't recall.

Q Now given that this letter came in less than 30 days after Segal had prepared and provided to the Fund a withdrawal liability calculation relating to The New York Times, isn't it the case that at the

ARBITRATION - VOLUME VI

time the Fund received this request, it already had in its possession the calculation that Segal had done the prior month, correct?

A I think so.

Q Did you ever advise the Fund in the summer of 2011 that it already had in its possession the calculation that had been undertaken and we discussed in Exhibit 17?

A No.

Q Do you know if Ms. Egan did?

A I don't know. I don't know.

ARBITRATOR IRVINGS: Can you keep your voice up a little bit, please.

THE WITNESS: Sure.

I don't know.

BY MR. MILLER:

Q And again, you'll see in the second numerated paragraph in this letter that they ask for backup worksheets relating to a calculation of The New York Times withdrawal liability.

In connection with the calculation

ARBITRATION - VOLUME VI

that Segal performed and which is discussed in the July 19, 2011 letter that we just went over, I assume that there would have been backup worksheets in connection with that undertaking?

MR. RICHMAN: I want to make a general objection here and I raised it before and we've now come back to it.

These documents were all available for cross of this witness. There is no new document that's being brought into play here. So is this a double --

MR. MILLER: We didn't finish the cross. It's not more complicated than that.

ARBITRATOR IRVINGS: It was terminated because it was an issue of what additional documents were out there.

MR. MILLER: Exactly.

ARBITRATOR IRVINGS: Go ahead.

BY MR. MILLER:

Q So again, in connection with the

ARBITRATION - VOLUME VI

July calculation that we previously discussed, Segal would, in its normal course, maintain the backup worksheets for such a calculation, correct?
A Yes.
Q Okay.
And those backup worksheets for the July 2011 calculation would have been in Segal's possession as of August 15, 2011, correct?
A Yes.
Q And do you know of any reason why those backup worksheets could not have been promptly provided to the Fund in connection with this August 15, 2011 request?
A No.
Q Do you know whether the backup worksheets for the July calculation were ever provided to the Fund?
A No, we don't provide backup worksheets.
Q Do you know if the Fund ever responded to the letter from James Dexter of Dexter Hofing to Stephen Mogila dated

August 15, 2011?
A No.
Q Now I want to focus my questions on the documents that's contained in the yellow set.
But before I do, I want to get into some foundational questions that will help, hopefully, move the examination along.
Let me know when you are ready.
A Ready.
Q So you were the client relationship manager for Segal in connection with the NMDU Fund engagement, correct?
A Yes.
Q And you attended all the trustee meetings during the term of Segal's engagement by the Fund, correct?
A I believe so.
Q And among your responsibilities as client relationship manager was to take notes at meetings of the trustees and prepare the initial draft of the trustee minutes, correct?
A Yes.

Q And am I correct that once you prepared the initial draft, you would then send that draft to the Fund administrator and to Mr. Schelberg as counsel to the Fund?
A Yes.
Q And you do so in order to obtain their comments and edits, correct?
A Yes.
Q And am I correct that occasionally, Proskauer Rose or, more particularly, Mr. Schelberg, would edit your draft of the minutes and save those edits in a new document that would have a Proskauer Rose document number on the bottom; is that correct?
A I don't know.
Q But is it fair to say that before -- strike that.
Once counsel and the Fund administrator had made their suggested changes and approved the draft of the minutes with those changes, the practice was then to send the minutes back to you, correct?

A Yes.
Q And you, in turn, would then disseminate the minutes to trustees as approved by the Fund administrator and Mr. Schelberg prior to the subsequent trustees meeting, correct?
A Yes.
Q And am I correct, therefore, that the language and terminology that's contained in the trustee minutes would be either your language and terminology or the language and terminology of the Fund's counsel or administrator, correct?
A Yes.
Q And the language and the terminology that is contained in those minutes would, in turn, reflect the statements and terminology that was actually used at the trustee meetings, correct?
A Yes.
Q And in all instances, you, Fund counsel, Schelberg and the Fund administrator would sign off on the language and terminology used in those minutes before

ARBITRATION - VOLUME VI

those minutes were more widely disseminated to trustees and Fund staff, correct?

A Yes.

Q All right. Let's take a look at some particular documents.

Why don't you draw your attention to Exhibit 126. It's a document that contains the minutes of a trustee meeting of September 20, 2007.

Ready?

A Oh, yes.

Q So drawing your attention to the first page of the minutes where it indicates who was present, it indicates that you were present at this meeting.

Do you see that?

A Yes.

Q Okay.

Do you have any reason to believe you did not attend the September 20, 2007 meeting of the NMDU Fund trustee?

A No.

Q And do you have any reason to believe that you did not prepare the initial

ARBITRATION - VOLUME VI

draft of the minutes of that meeting?

A No.

Q All right. Let's take a look at Page 4 -- I'm sorry, Page 5 of the minutes.

And on Page 5, you see a couple of bullet points and they're kind of wedged between some redacted material.

Do you see that?

A Yes.

Q Okay.

So on Page 5, it indicates near the top that there was some discussion relating to diversion and the Union trustees excuse themselves to caucus and upon their return, they made a proposal which is set forth in the two bullet points in the middle of the page.

Do you see that?

A Yes.

Q I want to draw your attention to that third bullet, the one that begins, "If the sixers contribution is not implemented ..."

Do you see that?

ARBITRATION - VOLUME VI

A Yes.

Q You'll note that in this bullet, it specifically states that in connection with the Welfare Fund, employees make shift contributions.

Do you see that?

A Yes.

Q And it refers to a possible increase in shift contributions?

A Yes.

Q Do you know why that specific language referring to shift-based contributions was used in denoting how contributions to the Welfare Fund are made?

A It's because how they were done.

Q Why don't you turn your attention to Exhibit 134.

And 134 contains the minutes of a May 19, 2010 board meeting of the NMDU Fund.

And I think I'm going to skip for the moment questioning you about the minutes themselves and, instead, ask you to turn your attention to an exhibit to those meeting minutes.

ARBITRATION - VOLUME VI

It's Exhibit F, which begins at 03356.

A Yes.

Q Before I dive in, let me just ask a quick foundational question or two.

The minutes from this May 19th meeting indicates that you were present, if you take a quick look at the first page.

Do you have any reason to believe you were not present at this meeting?

A No.

Q Okay. Back to Exhibit F.

Exhibit F is a memo from you and Ms. Egan to the board of trustees and it addresses the issue of information requests for 2010 zone certification.

Do you see that?

A Yes.

Q And am I correct that one of the elements of the Pension Protection Act of 2006 in connection with multi-employer pension plans was to require that the actuaries for these plans provide an annual certification as to what zone of funding the

Page 1244

ARBITRATION - VOLUME VI

plan would be in, correct?
A Yes.
Q Okay.
So this letter is essentially an information request to the board of trustees so that Segal can -- consistent with the statutory requirements, could prepare the 2010 zone certification for this fund, correct?
A Yes.
Q And I noticed that your name is first in the memo, it's not alphabetical.
Does that mean that you wrote this memo?
A No. It had no bearing.
Q Okay. But did you write this memo?
A I prepared this memo with Ms. Egan.
Q So it's fair to say that you and Ms. Egan jointly drafted this?
A Yes.
Q Let me draw your attention to Page 2 of the memo under that heading Number 4, which is Projected Industry Activity.

Page 1245

ARBITRATION - VOLUME VI

Do you see that?
A Yes.
Q At the bottom of that paragraph in the last sentence, you and Ms. Egan indicate to the trustees that you are going to need an assumption, it says "for three items."
Do you see that?
A Yes.
Q And the third and last of those items is information on expected wage increases in future years.
Do you see that?
A Yes.
Q And the remainder of that sentence, it explains why you need information from the trustees about expected wage increases, correct?
A Yes.
Q And, indeed, it says and explains that the reason you need information on expected wage increases is because contributions are a percentage of wages, correct?
A Yes.

Page 1246

ARBITRATION - VOLUME VI

Q Did you discuss this memo with the trustees at the May 19, 2010 board meeting?
A Yes.
Q And do you have any reason to believe that in the meeting, you used language in describing the contribution formula for the NMDU Fund that is different from the language that's contained in this last sentence in Paragraph Number 4?
A I don't recall if we went into that great of detail.
Q Now, this letter requesting annual -- strike that.
This letter requesting information for an annual certification, this was, in fact, a form letter that you and Ms. Egan, indeed, sent to the trustees annually, correct?
A Yes, it's a letter that was sent annually.
Q Okay.
And am I correct that in each year in which you sent the trustees this memo, you continued to use this same language

Page 1247

ARBITRATION - VOLUME VI

describing contributions as a percentage of wages, correct?
A I don't recall without seeing each letter.
Q Okay. Well, let me see if I can help you.
Why don't you turn to Exhibit 144 and this form letter is contained at FUND-03434.
And you'll see on Page 2 there's that same Paragraph 4 about Projected Industry Activity.
Do you see that?
A Yes.
Q And this 2013 version of the letter uses these same terminology in connection with describing the contribution formula to the Pension Fund, correct?
A Yes.
Q And if you quickly turn your attention to Exhibit 150, you'll see that at the back of that exhibit is the form of this letter for 2014 and just take a quick look at Paragraph 4 and confirm to me that the

ARBITRATION - VOLUME VI

2014 version also contains this same terminology in characterizing the contribution formula?

A Yes.

Q It does, correct?

A Yes.

Q So in light of these documents, let me return to the more general question that I asked a moment ago.

Am I correct that in each year in which you sent this memo, you continued to use this same language describing contributions as a percentage of wages, correct?

A Yes, based on what I reviewed.

Q Let's move on and -- let's move on to Exhibit 136.

And 136 contains the meeting minutes for a meeting dated December 20, 2010.

Do you see that?

A Yes.

Q And it also indicates on the first page of the minutes that you attended.

ARBITRATION - VOLUME VI

Any reason to believe you did not attend?

A No.

Q Any reason to believe that you did not prepare the initial draft of these minutes?

A No.

Q Let me draw your attention to Page 5 of the minutes.

And there's a discussion that begins under the heading with a capital B, says, "Discussion ensued regarding the Fund's seriously endangered status."

Do you see that?

A Yes.

Q Okay.

It appears that -- and I want to try to move this along quickly.

It appears from the minutes that in connection with this discussion about the Fund's seriously endangered status, at the end of that discussion, which is characterized as lengthy, the trustees requested the Segal representatives to

ARBITRATION - VOLUME VI

provide projections of the Fund's funded status taking into consideration certain assumptions.

Do you see that?

A Yes.

Q Okay.

Take a moment and why don't you read those bullet points that set forth the assumptions and then I'm going to ask you a couple questions about it.

Ready?

A Yes.

Q So let's take a look at the first bullet.

And in the first bullet, the trustees are requesting Segal to do some modeling about Fund's funded status taking into consideration required increases in employer contribution rates.

This bullet makes no reference to shifts or a shift rate in describing the employer contribution rates; does it not?

A No.

Q Now, let me draw your attention to

ARBITRATION - VOLUME VI

the fifth bullet, the one just up from the bottom. The one that begins, "An increase in employer contributions."

Do you see that one?

A Yes.

Q So the first sentence talks about modeling based on an assumption that there would be an increase in employer contributions of half a million to a million dollars. And then it says, "Based on a reallocation of employer contributions from the Welfare Fund."

Do you see that?

A Yes.

Q So am I correct that in connection with the NMDU Fund, at least during 2010, there was, at that time, a diversion protocol in which a portion of a Pension Fund contributions were diverted to the Welfare Fund?

A Yes.

Q And in connection with this first sentence in the bullet point, it makes note of a potential reallocation of the diverted

ARBITRATION - VOLUME VI

contributions from the Welfare Fund back to the Pension Fund, correct?
A Yes.
Q Okay.
So am I correct that when these notes use the word "reallocation" in this bullet point, what they were referring to was taking some of the monies that had been diverted or allocated to the Welfare Fund and reallocating them back to the Pension Fund, correct?
A Yes.
Q Now I want to have you focus your attention on the second sentence of that bullet point, the one that begins, "The Welfare Fund contribution allocation."
Do you see that?
A Yes.
Q So I gather that what this minute is referring to is the -- it memorializes a trustee observation made at the meeting that if there is a reallocation from the Welfare Fund back to the Pension Fund, that reallocation will result in the Welfare Fund

ARBITRATION - VOLUME VI

having less contributions and the diminution in Welfare Fund contributions can be offset by an increase in the shift rate contribution.
Does that appear to be what that minute is addressing?
A Yes.
Q And the reference in that sentence to, quote, "shift rate contribution," that would be a reference to the Welfare Fund, correct?
A Yes.
Q And that's because employees make contributions to the Welfare Fund here based on a shift rate, correct?
A Yes.
Q And that's also because some employers contribute to the Welfare Fund here, in part, based on a shift rate, correct?
A Yes.
Q Do you know why the minutes in this fifth bullet point specifically referred to Welfare Fund contributions as shift rate

ARBITRATION - VOLUME VI

contributions, but make no reference to shift rates in that first bullet when describing employer contribution rates to the Pension Fund?
A The method for the Welfare Fund contribution by the employees, not the employer, were based on the shifts worked for all the employees who were eligible for benefits under the Welfare Fund.
Q And this last sentence which refers to "shift rate contributions," is that referring to a shift rate contributions for employees and employers?
A No. It says "employee."
Q No, it doesn't. It does not in that sentence, that's why I'm asking you the question.
A Okay. Sorry.
Q Do you know the answer to that question?
A I'm sorry, can you repeat the question?
MR. MILLER: Can you repeat the question back?

ARBITRATION - VOLUME VI

(Requested portion of record read.)
A Here, it's referring to employee.
Q But it doesn't say that?
A No.
Q So let's head to 137.
So Exhibit 137 contains meeting minutes of a meeting on February 15, 2011.
And those meeting minutes, again, indicate, Mr. Urbank, that you attended and let me ask, once again.
Do you have any reason to believe you did not attend?
A No.
Q Okay.
And you'll see that following the four pages of minutes, there's a copy of a PowerPoint presentation, what appears to be a PowerPoint presentation.
Do you see that?
A Yes.
Q And am I correct that this PowerPoint presentation was handed out and discussed at this February 15, 2011 meeting?
A Yes.

ARBITRATION - VOLUME VI

Q And why don't you turn to, I guess it would be PowerPoint Slide 4, which is at FUND-03370.
Do you see that?
A Yes.
Q And there's reference to the initials CR.
That would be contribution rate, right? That would be an abbreviation for the words "contribution rate"?
A Yes.
Q So am I correct that this slide discusses a possible funding improvement plan option in which the contribution rate for the NMDU Pension Fund would move from 8 percent, it says, of wages increasing to 11.5 percent.
Am I correct?
A Yes.
Q Does anything on this slide mention shift numbers or a shift rate? Yes or no?
A No.
MR. RICHMAN: The yes or no stuff really should stop.

ARBITRATION - VOLUME VI

MR. MILLER: Why? I'm allowed to ask him --
MR. RICHMAN: No, you ask one question at a time, then you stop and then the person answers it before he says yes or no.
ARBITRATOR IRVINGS: It's fine. It called for a yes or no answer.
Let's move on.
BY MR. MILLER:
Q Why don't we turn --
MR. RICHMAN: The reason -- I'm sorry. The reason I raise that is that the witness has a right to answer other than yes or no.
MR. MILLER: No, he doesn't. If he's asked a yes or no question, he needs to answer that yes or no and --
ARBITRATOR IRVINGS: Let's move on.
BY MR. MILLER:
Q Turn your attention to FUND-03378.
And here, in connection with

ARBITRATION - VOLUME VI

scenarios 2 and 3 for, again, a possible funding improvement plan, there is, once again, a reference to an 8 percent contribution rate increasing to, in one case, 10 percent and in another case to 9 percent, correct?
A Yes.
Q And this reference to reallocation, that would be reallocation from the Welfare Fund to the Pension Fund?
A No.
Q What is that relating to?
A You mean going from 8 percent to 9 percent?
Q Oh, it just means the increase?
A Yes. Reallocating the contribution from 8 percent to 9 percent.
Q Okay.
Let's turn to Exhibit 138, April 6, 2011 meeting minutes.
And the first two pages -- strike that.
Mr. Urbank, once again, it indicates in the front page of the meeting

ARBITRATION - VOLUME VI

minutes that you attended, and I assume you have no reason to believe you were not in attendance?
A Correct.
Q And you'll see that Pages 1, 2 and 3 are primarily devoted to a discussion of a funding improvement plan that, apparently, occurred at this April 6th meeting, correct?
A Yes.
Q And there's a lot of mention on Page 2 of these minutes of advice and points that you made in connection with the discussion on April 6th.
Do you see that?
A Yes.
Q Okay.
I want to draw your attention to the last paragraph on Page 2 right above the box that's labeled "Redacted."
And why don't you just read to yourself the last two sentences in that paragraph.
Ready?

ARBITRATION - VOLUME VI

A Yes.
Q And am I correct that these notes refer to a discussion and advice that you provided to the trustees at this meeting about the mandatory or required schedules under the law relating to a funding improvement plan?
A Yes.
Q Okay.
And furthermore, at the very bottom of that paragraph, there is mention of two funding improvement plan proposals in which it says, "The employer contribution rate would be increased from 8 percent to 12.4 percent in one proposal and from 8 to 13.6 percent in the other proposal."
Do you see that?
A Yes.
Q So am I correct that these minutes indicate that during the meeting with the trustees, you referred to the employer contribution rate as a percentage, correct?
A Yes.
Q Do you have any reason to believe

ARBITRATION - VOLUME VI

that at that meeting, you did not refer to the contribution rate as a percentage?
A No.
MR. RICHMAN: He just said yes.
ARBITRATOR IRVINGS: Thank you.
BY MR. MILLER:
Q All right. Let's move to Exhibit A.
So I take it, this is a revised version of the PowerPoint presentation we previously looked at.
And this revised version was discussed at the April 6, 2011 meeting, correct?
A Yes.
Q Okay.
And if you take a look at, again, Slide 4 and probably Slide 12 -- not Slide 12 -- just Slide 4 in this case, it, again, uses the phrase "8 percent CR" where "CR" means contribution rate, correct?
A Yes.
Q Okay.
This PowerPoint presentation which

ARBITRATION - VOLUME VI

we looked at now two iterations of, this PowerPoint presentation was continuously edited and we presented to the trustees during the course of 2011, correct?
And if you need to -- why don't you turn to Exhibit 143 and you'll see another iteration.
A I'm sorry? Which page?
Q Exhibit 143 where you'll see another iteration.
And, indeed, as my colleague pointed out, the version in Exhibit 143 is, in fact, dated February of 2013, right?
A Yes.
Q So am I correct that during the period from 2011 to 2013, Segal routinely presented various iterations of this PowerPoint presentation respecting the creation of a funding improvement plan?
MR. RICHMAN: Objection as to the word "routinely."
MR. MILLER: Why don't you repeat the question. This is not working. And we'll ask it without

ARBITRATION - VOLUME VI

the word "routine."
THE REPORTER: Hit the "Follow" icon on the right side, will take you to the end.
MR. MILLER: Oh, I see. Okay.
BY MR. MILLER:
Q Am I correct that during the period from 2011 to 2013, Segal presented various iterations of this PowerPoint presentation in connection with the creation of a funding improvement plan?
A Yes.
Q And in communicating -- strike that.
And in each of the iterations of this PowerPoint presentation, you referred to the contribution rate as a percentage or percentage of wages, correct?
A Yes.
Q And there is no mention of the words "shift rate" or "shift wage" in any of the PowerPoint presentations that Segal made during the period from 2011 to 2013, correct?

ARBITRATION - VOLUME VI
A No.
Q And in communicating the material on these PowerPoint presentations to the trustees, you used the same language and terminology that you employed in the PowerPoint presentation itself, correct?
A In what context?
Q Well, let me ask that question more clearly.
You discussed these PowerPoint presentations with the trustees, correct?
A Yes, at meetings.
Q And in doing so, you used the same terminology that's contained in the PowerPoint presentations, correct?
A Yes.
Q The Pension Protection Act was, I think, enacted in 2006.
Is it fair to say that the Pension Protection Act was discussed at many meetings of the NMDU Fund between 2006 and when Segal's engagement with this fund concluded?
A It was discussed. I don't know how

ARBITRATION - VOLUME VI
many.
Q Okay.
Was it the subject of much discussion at many meetings?
A It was discussed at the meetings.
Q At numerous meetings?
A Over the course of six years, it was discussed at many meetings during that period.
Q Okay.
MR. MILLER: I have no further questions.
MR. RICHMAN: I think it makes sense not to break for lunch.
MR. MILLER: No, I agree.
ARBITRATOR IRVINGS: I agree.
FURTHER DIRECT EXAMINATION BY MR. RICHMAN:
Q So you testified previously that contribution base units were shifts both in a prior proceeding and today.
And is that still your understanding how the Pension Fund works?
A Yes.
Q Now I want to show you Exhibit 42.

ARBITRATION - VOLUME VI
White book.
You got 42 in front of you?
A 42.
Q All right.
So the first page, which is 2370?
A Yes.
Q So there's a cover page.
Do you see that?
A Yes.
Q Okay.
And then behind it, if you just take a quick look. I'm not asking you to read it. Just take a quick look.
You received this document?
A Yes.
Q And I want to focus you on the -- let's look at Page 2371.
You got that page?
A Yes.
Q And you see under the heading Effective 3-31-2013.
Do you see that?
And if you see on the left-hand side, it says, "Day rate, short night, long

ARBITRATION - VOLUME VI
night, Saturday night."
Do you know what those are?
A They're different shift periods.
Q Okay.
And do all the shifts have the same number of hours?
A I don't know.
Q I want to show you Exhibit 150. So let's look at 150, Exhibit 150, and that is in the yellow book, I believe.
Do you see that?
A Okay.
Q Now --
A I have a different 150.
Q I'm sorry. Yes. Okay.
So look in 150, these are minutes of the January 31, 2014 --
ARBITRATOR IRVINGS: January 20 --
MR. MILLER: January 31 -- no, we have a different one.
ARBITRATOR IRVINGS: We have a different one.
BY MR. RICHMAN:

Q Sorry. June 20, 2014, trustees meeting.
Do you see that first page?
A Yes.
Q And then what I'm focused on is go to Page 3437 on the bottom right-hand corner. That's Exhibit A.
A Oh, yes.
Q Okay.
Now, you see in a sentence that in the left-hand margin begins, "May 31, 2025," or a line that begins "May 31, 2025 ... "?
Do you see that?
A Yes.
Q Okay.
And then the next sentence says, "Assuming that all employers will adopt the alternative schedule; i.e, the distribution rate increases from 8 percent to 11.8 percent of the shift rate when the new collective bargaining agreements negotiated ... " And then it goes on.
And Mr. Miller took you through various documents, funding improvement plan

documents as they were changed from time to time. And the phrase "shift rate" wasn't in those documents, correct?
A Correct.
Q But it's in this document, and why is that?
A Here, we were just clarifying what the contribution basis was.
Q And why were you clarifying this?
A Just for clarification purposes so everybody was fully aware.
Q Okay.
Well, the date of the document is April 14, 2014.
A Uh-huh.
Q 3437, right?
Is that before or after The New York Times withdrew from the Fund?
A The withdrawal liability was prior to that.
Q And so why were you using the term "shift rate" in this document and you hadn't used it in the Funding improvement plan document?

A Just to clarify what the contribution basis was.
Q And why did you feel the need to clarify it?
A Because there was some misunderstanding going on related to contributions.
Q Okay.
And what were those misunderstandings?
A That we were just referencing more globally contribution rate as a percentage of wages versus that it was actually based on the daily wage rate or shift rate.
MR. MILLER: Objection. He's speculating.
BY MR. RICHMAN:
Q Why did you think it was the confusion?
A Because the questions raised.
ARBITRATOR IRVINGS: You are asking him why he thought someone else was confused? You can ask him why he did this, but if you are

asking him about the state of someone else's mind ...
MR. RICHMAN: That's fine.
BY MR. RICHMAN:
Q In the various documents that Mr. Miller took you through and it said "contribution rate percentage of wages."
Do you remember those?
A Yes.
Q Okay.
And why wasn't the term "shift" used in those documents?
A We didn't think it was necessary at the time to be so explicit in terms of the contributions, it was -- effectively, mathematically it works out that he take the percentage of the wages daily or entirely and you come up with the same amount for the contributions.
Q And did the contribution base unit during the time that you were consultant to the Fund change from shifts?
A Not that I'm aware aware.
Q I want to take you on a different

ARBITRATION - VOLUME VI

subject here and that has to do with the minutes.

You went to the trustees meeting, as I understand your testimony, you took notes at the meetings?

A Yes.

Q Okay.

And when you took notes at the meetings, did you take -- did your notes correspond with what was happening at the meeting at the time?

A Yes.

Q And were there times where agenda items were changed in terms of Agenda Item 6 being taken up before Agenda Item 3?

A During the course of the meeting, that could have happened.

Q Okay.

And when that happened or if that happened, the notes that you took would reflect that 3 become before 6 or 6 before 3?

A The order I take my notes is in the order of the events that happened at the

ARBITRATION - VOLUME VI

meeting, regardless of what it said on the agenda, order of the agenda.

Q Okay.

And then as I understand it, you send your notes to the Fund director, correct, Mr. Schwartz?

A Yes. And counsel.

Q And counsel. Okay.

And that counsel was Mr. Schelberg?

A Yes.

Q Okay.

And then they make comments on the draft that you did, correct?

A They return them to me with their edits.

Q And when you did the draft minutes, did the draft minutes follow the order of the meeting?

A Yes.

Q Okay.

And do you recall any situation in which you got back minutes as edited by Mr. Schelberg or the Fund administrator where they changed the order of your draft

ARBITRATION - VOLUME VI

minutes?

A I don't recall.

Q So you don't recall that it happened or you don't recall it ever happened?

A I don't recall that they changed the order that I had initially written the minutes in.

Q Now, in the minutes -- and let's go to the October 11th minutes. That is 140 in the yellow book.

Now --

MR. RICHMAN: I'm going to take a break for a second. Sorry. We'll be right back.

(Pause.)

BY MR. RICHMAN:

Q Okay. Mr. Urbank, do you ever remember at a trustees meeting a trustee giving his voting proxy to another trustee?

A No, I don't.

MR. RICHMAN: I have no further questions.

MR. MILLER: Just give us a

ARBITRATION - VOLUME VI

minute.

(Pause.)

MR. MILLER: We have no further questions.

ARBITRATOR IRVINGS: Excellent.

(Whereupon, the proceedings had concluded at 1:15 p.m.)

ARBITRATION - VOLUME VI

C E R T I F I C A T E

STATE OF NEW YORK)
: ss.
COUNTY OF NEW YORK)

I, BARBARA R. ZELTMAN, Shorthand Reporter and Notary Public, within and for the State of New York, do hereby certify:

That this transcript is a true record of the proceedings had.

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 19th day of October, 2015.

____

BARBARA R. ZELTMAN
Court Reporter and Notary Public

ARBITRATION - VOLUME VI

I N D E X